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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 614

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, *Petitioner*,

v.

NATIONAL MEDIATION BOARD; FRANCIS A. O'NEILL, JR., individually and as Chairman of the National Mediation Board; ROBERT O. BOYD, individually and as Member of the National Mediation Board; LEVERETT EDWARDS, individually and as Member of the National Mediation Board; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; UNITED AIR LINES, INC.; and BRANIFF INTERNATIONAL AIRWAYS, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Air Line Stewards and Stewardesses Association, International, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on July 13, 1961 (Appendix B, *infra*, p. 3a).

OPINION BELOW

The opinion of the court below (Appendix C, *infra*, pp. 4a-6a) is reported at 294 F. 2d 910.

JURISDICTION

The judgment of the court below was entered on July 13, 1961 (Appendix B, *infra*, p. 3a). A petition for rehearing en banc filed within the proper time (R. 369) was denied on September 20, 1961 (R. 392). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). Jurisdiction in the district court was based primarily on 28 U.S.C. 1337.

QUESTIONS PRESENTED

1. Whether a hearing before the National Mediation Board or before a federal district court upon contested issues of fact is required by Section 2 of the Railway Labor Act (45 U.S.C. 152), the due process clause of the Fifth Amendment to the Constitution of the United States or the rules of procedure governing federal district courts, before a suit to set aside a certification of the National Mediation Board may be dismissed for want of jurisdiction on the assumption that the facts are other than those which the plaintiff alleged and offered to prove both before the National Mediation Board and the district court.

2. Whether a federal district court has jurisdiction of a suit brought by a union composed of air line stewardesses, which had previously been the duly certified bargaining representative and held valuable collective bargaining contracts, to set aside, as violative of due process of law and of Section 2 of the Railway Labor Act, orders of the National Mediation Board,

entered without a hearing as requested, certifying as the representative of stewardesses, in the place of the union composed of stewardesses, a union of pilots who have command authority over stewardesses and are management representatives and supervisors in their relationships with stewardesses.

3. Whether Section 2 of the Railway Labor Act bars certification as the representative of non-supervisory crew members of airplanes of a union composed of management representatives having full command authority and supervision over the non-supervisory crew members.

4. Whether a federal district court has jurisdiction to grant injunctive relief to prevent carriers from interfering with, influencing and coercing their employees to cease being represented by one union and to be represented by another union, in violation of Section 2, Third and Fourth of the Railway Labor Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth Amendment to the Constitution of the United States and of the Railway Labor Act (45 U.S.C. 151, *et seq.*) are set forth in Appendix A (*infra*, pp. 1a-2a).

STATEMENT OF THE CASE

This is a suit brought in the federal district court by the Air Line Stewards and Stewardesses Association, International (hereinafter sometimes called "ALSSA"), to enjoin the National Mediation Board from certifying, or if certification should issue while the suit was pending, to set aside the certification of the Air Line Pilots Association (hereinafter sometimes called "ALPA") as the collective bargaining representative of stewardesses employed by United Air

Lines and Braniff International Airways (J.A. 1-12).[1] The suit also sought to enjoin United and Braniff from influencing, interfering with or coercing stewardesses not to join or remain members of ALSSA (J.A. 11).

ALSSA had been the duly certified and recognized collective bargaining representative of the stewardesses employed by United and Braniff at all times since 1946 and 1947 (J.A. 4, 13, 14, 15) and as such representative was a party to valuable collective bargaining contracts with both United and Braniff in existence at the time the Mediation Board certified ALPA as the representative of the stewardesses employed by United and Braniff (J.A. 4-5, 17-84). At no time prior to January 1961 had ALPA ever sought to represent stewardesses (J.A. 3).[2]

When the Mediation Board notified ALSSA that ALPA had filed petitions to represent the stewardesses on United and Braniff (J.A. 4, 13, 14), ALSSA filed a request with the Mediation Board for a formal hearing at which it could introduce evidence to show that ALPA was disqualified to represent stewardesses because it was composed of pilots, no stewardess was a

[1] "J.A." references are to the Joint Appendix filed in the Court of Appeals, nine copies of which are being filed with the Clerk of this Court.

[2] At the time this suit was instituted ALSSA was the recognized representative for bargaining of 90% of all air line stewardesses and other flight service employees in the United States, and had collective bargaining contracts with 30 carriers by air, including all 12 major trunk carriers by air (J.A. 2). As a result of ALPA's raids on its bargaining rights ALSSA, while this suit has been pending, has been involved in proceedings before the Mediation Board which resulted in recertifying ALSSA after it won elections on Trans World Airlines (R-3511), Eastern Air Lines (R-3507), Northwest Airlines (R-3454), Northeast Airlines (R-3518), Western Air Lines (R-3498), Pacific Air Lines (R-3508) and Caribbean Atlantic Airlines (R-3499).

member or eligible to membership, and pilots by reason of the command authority over stewardesses vested in them by the Civil Aeronautics Board regulations and by the carriers, stood in the relationship of management to stewardesses (J.A. 85-96). ALSSA pointed out that the Civil Aeronautics Board had interpreted its regulations as giving pilots "full control and authority without limitation" over stewardesses and their duties (J.A. 86, 92); that the carriers have insisted that the pilots have the same relationship to stewardesses as captains of seagoing vessels have toward unlicensed crew members (J.A. 86, 92); that stewardesses were discharged or otherwise disciplined by the pilot or on his recommendation (J.A. 86-87, 92-93); and hence representation of stewardesses by pilots would violate Section 2 of the Railway Labor Act.

The Mediation Board denied ALSSA's request for hearing. In doing so, the Board stated (J.A. 97-98):

> "It will be noted there is no restriction contained in the language of the Act on who may be certified as the representative of the employees of a carrier subject to the Act. However, the Board for many years has had a policy of not certifying a carrier or an officer of a carrier as an employee representative for the purposes of the Act. The Board is of the opinion that the Air Line Pilots Association is not barred, under such policy."

In denying ALSSA a hearing the Board did not make clear, and has never made clear to this day whether it was taking the position that pilots do not supervise stewardesses on behalf of management or whether its position was that such supervision on behalf of management is irrelevant under the Railway Labor Act.

ALSSA thereupon filed this suit in the district court naming as defendants the National Mediation Board

and its members O'Neill, Boyd and Edwards, the two air carriers involved, United Airlines, Inc. and Braniff International Airways, and ALPA (J.A. 1). The complaint sought to enjoin the certification of ALPA until a final determination of the eligibility of ALPA to represent stewardesses (J.A. 11). The claim that the Mediation Board had denied ALSSA due process of law in violation of the Fifth Amendment to the Constitution of the United States by denying a hearing as requested (J.A. 8) and that the Board had exceeded its jurisdiction and authority under the Railway Labor Act, were clearly set forth (J.A. 8-9). With respect to the charge of interference, restraint and influence, ALSSA in its complaint alleged in part, as follows:

> "The defendant, Air Line Pilots Association, International, is an unincorporated association composed of pilots many of whom occupy important management positions on commercial air carriers including but not limited to airline management positions such as president, vice president, high level positions in airline operations departments, chief pilots, assistant chief pilots, flight instructors and members of management committees which bargain with the Air Line Stewards and Stewardesses Association, International, and other labor organizations. In many instances pilots who are members of the Air Line Pilots Association, International sit as management representatives hearing grievances of stewards and stewardesses. The management hierarchy on airlines, without exception, is permeated with active members of the Air Line Pilots Association and the prevalence of supervisory pilots in high level managerial positions is a marked characteristic of the airline industry" (Para. 4, Complaint, J.A. 3). . . .
>
> ". . . Braniff International Airways and United Air Lines, Inc., have each vested in their pilots

authority in the interest of their employer to remove stewards, stewardesses and pursers from active duty, to recommend their discharge, to discipline them, to assign them duties, to direct their performance of duties and to recommend that they be rewarded or disciplined, in all of which respects the pilots thereby are agents of Braniff and United in dealing with the stewards, stewardesses and pursers . . ." (Para. 12, Complaint, J.A. 7). . . .

"The defendants, United Air Lines, Inc. and Braniff International Airways, through the actions of their respective pilots have each interfered with, influenced and coerced the respective stewards, stewardesses and pursers employed by said defendants in the designation of representatives to represent said stewards, stewardesses and pursers in violation of Section 2, Third, of the Railway Labor Act (45 U.S.C. 152, Third), and have each interfered with the organization of its stewards, stewardesses and pursers, and have each influenced and coerced stewards, stewardesses and pursers in an effort to induce them to join the Air Line Pilots Association and not to join or remain members of the Air Line Stewards and Stewardesses Association, in violation of Section 2, Fourth, of the Railway Labor Act (45 U.S.C., 152, Fourth)" (Para. 18, Complaint, J.A. 9, 10).

ALSSA sought a temporary restraining order to prevent the Mediation Board from conducting an election with ALPA on the ballot; this motion was denied (J.A. 101, 334).

ALSSA then moved for a preliminary injunction; the Mediation Board, O'Neill, Boyd and Edwards moved to dismiss or, in the alternative, for summary judgment, and ALPA and United Air Lines moved to dismiss (J.A. 101, 242, 321, 335). ALSSA in opposing these motions filed the appropriate pleadings required

by the rules of the District Court of the District of Columbia to defeat a motion for summary judgment, namely, a "Statement of Genuine Issues" in which ALSSA alleged that the following genuine issues of fact exist and require litigation (J.A. 337):

> "(1) Plaintiff asserts that defendant Air Line Pilots Association is composed of pilots who function as representatives of management in supervising stewards and stewardesses (Complaint, ¶¶ 4 and 12).
>
> "(2) Plaintiff asserts that defendants United Air Lines and Braniff International Airways, through their pilots, interfered with, influenced and coerced their stewards and stewardesses in the designation of representatives, and interfered with such employees' freedom to organize (Complaint, ¶ 18)."

In respect to the foregoing issues of fact ALSSA explained its position to the district court as follows (J.A. 337-338):

> "If it is the defendants' position that pilots are not supervisory or management employees, there is then a clear issue of fact as between plaintiff and defendants, and as to this issue plaintiff was unlawfully deprived of a hearing by the National Mediation Board. If, however, it is the position of defendants that the supervisory status of pilots is irrelevant to their right to represent stewards and stewardesses, such a position is unlawfully inconsistent with the Mediation Board's own policy of not permittting company officials to serve as employees' bargaining representatives (Complaint, Exhibit No. 8), and such a position violates Section 2, Ninth of the Railway Labor Act in that said Section mandates the Board to 'insure the choice of representatives by the employees without interference, influence or coercion exercised by the carrier'."

Supporting affidavits were attached (J.A. 340-348) which included excerpts from United's stewardess manual in which United stated "All stewardesses and flight stewards are responsible to the captain" (J.A. 347).

The district court heard the motions to dismiss and for summary judgment, limiting argument to the question of the court's jurisdiction. After the submission of memoranda by the parties, the district court granted the motions to dismiss and motion for summary judgment on the ground that the court lacked jurisdiction under *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301, 302, 303 (J.A. 352).

Upon appeal to the United States Court of Appeals for the District of Columbia Circuit, judgment was affirmed (R. 368). The court of appeals, although reciting that the suit was rightly dismissed for lack of jurisdiction under *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, did not address itself to the jurisdictional issue as such but instead decided on the merits that the Railway Labor Act does not forbid representation of the stewardesses by a union of pilots who "perform some supervisory and managerial functions in regard to stewards and stewardesses" (p. 5a, *infra*, Appendix C). The court ruled that no constitutional question was presented since the Mediation Board is not required to grant any hearing (p. 5a, *infra*, Appendix C). With respect to the allegations in the complaint that United and Braniff had influenced, interfered with and coerced stewardesses to transfer their representation rights from ALSSA to ALPA, the court ruled that this claim was not within the jurisdiction of the district court but rather the remedy was application to the United States

District Attorney to institute a criminal prosecution under Section 2, Tenth of the Railway Labor Act (p. 6a, *infra*, Appendix C).

REASONS FOR GRANTING THE WRIT

1. This case seeks protection from this Court for the important constitutional right to be accorded a hearing on disputed issues of fact as a prerequisite to administrative or judicial denial of substantive rights based on an adverse factual decision. The jurisdictional problems posed for the court below by this Court's decision in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), led the court below to avoid a direct analysis of jurisdiction available to it under that decision by doing what this Court has done on occasion,[3] namely, affirming a dismissal for want of jurisdiction by determining that the administrative agency involved had not acted unlawfully. But where this Court has followed that procedure, there had been a full hearing on all relevant issues of fact and law before the administrative agency, with a full record before the courts for review, whereas here the administrative agency expressly refused to hold any hearing (J.A. 98, 100). In the instant case, the court below, by placing an adverse interpretation on the facts to hold that there was no case and hence no jurisdiction, deprived petitioner of due process of law because at no time had petitioner been afforded any hearing of the disputed factual issues.

That this is an accurate analysis of the decision below is evident on a study of the record. Nowhere in its ruling denying petitioner a hearing (J.A. 98, 100)

[3] *Inland Empire District Council v. National Labor Relations Board*, 325 U.S. 697, 709-701, 703 (1945).

nor in its pleadings nor briefs in the court below has the Mediation Board ever taken the position that, if ALPA is composed of persons having full managerial and supervisory power over stewardesses as petitioner alleges, it may nevertheless properly serve as the representative of stewardesses under the Railway Labor Act. Rather the Mediation Board and the courts below seem to be assuming that ALPA is not the kind of an organization which petitioner has alleged and offered to prove it to be. This constitutes a decision of the case on disputed factual issues without a hearing thereon. At all stages of the proceedings before the Mediation Board and the courts petitioner has requested (J.A. 90, 96, 337-338) and been denied a hearing on these factual issues (J.A. 98, 100, 352).

In addition, the court below expressly held (p. 5a, *infra*, Appendix C) that the Mediation Board is not required to give a hearing to a protesting union, citing in support thereof this Court's decision *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, at 304. The statement to which reference is made appears to be solely a reference to the failure of the Railway Labor Act to include any express requirement of a hearing. It does not appear to have been intended by this Court as a ruling that the Mediation Board might make adjudications of disputed factual issues without holding any hearing. In any event only dictum is involved because in that case the Mediation Board had in fact held a hearing at which all parties were afforded full opportunity to present evidence (Record before this Court in No. 48, October Term, 1943: pp. 28-29, 76, 83; *New York Central R.R. Co.*, 1 N.M.B. 197, 198), and there was no issue raised in this Court as to the adequacy of that hearing. However, review of the question of the right to a hearing is necessary

to clear up the misunderstandings to which the foregoing dictum of this Court has given rise.

This Court has long held that an administrative agency deprived parties of due process of law if it made any determination of a disputed fact pertinent to an adjudication affecting the rights of persons without affording to all affected persons a hearing with opportunity to present evidence. *Greene* v. *McElroy*, 360 U.S. 474, 496-497, 507-508 (1959); *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 135-136, 138-139, n. 11, 143, 164-165, 170-174, 178, 187 (1951); *Morgan* v. *United States*, 304 U.S. 1, 18-19 (1938); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 300, 302, 304 (1937); *Morgan* v. *United States*, 298 U.S. 468, 480 (1936); *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U.S. 63, 68-69, 71 (1935); *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117, 123 (1926); *Bratton* v. *Chandler*, 260 U.S. 110, 112-115 (1922). We have been unable to find any authority which would support the view that the Mediation Board may properly decide disputed issues of fact in a representation dispute without affording a hearing.

2. This Court should also grant a review in the instant case to clear up the notion which appears to prevail in the courts below that *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943) constitutes a complete bar to jurisdiction to review any proceeding of the Medation Board involving a representation dispute. Two other cases urging the Court to clarify this point are now pending before this Court on petitions for writs of certiorari. *UNA Chapter Flight Engineers' International Association, AFL-CIO* v. *National Mediation Board*, No. 5[illegible], October Term, 1961; *WES Chapter, Flight Engineers' International Association, AFL-CIO* v. *National Mediation Board*, No. 540, October Term, 1961. Unless this Court

clarifies the law in this respect no person deprived of rights before the Mediation Board has any possibility of obtaining a hearing before any court. Only in the District of Columbia can the requisite venue and service of process be had over the Mediation Board. Thus, the court below is the only court of appeals before which any cases involving the Mediation Board can come. But the court below has repeatedly and consistently announced and applied its view "that, under the Supreme Court's decision in *Switchmen's Union of North America* v. *National Mediation Board*, the Board's performance of functions assigned to it by the Act was not subject to judicial review." *American Air Export & Import Co.* v. *O'Neill*, 221 F. 2d 829, 831 (1955); *Order of Railway Conductors* v. *National Mediation Board*, 141 F. 2d 366, 367-368 (1944), certiorari sought and granted as to parties other than the National Mediation Board, 323 U.S. 688, and writ dismissed, 323 U.S. 166; *Decker* v. *Venezolana*, 258 F. 2d 153, 154 (1958); *Rutas Aereas Nacionales, S.A.* v. *Edwards*, 244 F. 2d 784, 785 (1957); *Radio Officers Union* v. *National Mediation Board*, 181 F. 2d 801 (1950); *United Transport Service Employees* v. *National Mediation Board*, 179 F. 2d 446, 450 (1949); *Kickland* v. *Atlantic Coast Line R. Co.*, 167 F. 2d 529 (1948), certiorari denied 335 U.S. 843; *National Federation of Ry. Workers* v. *National Mediation Board*, 141 F. 2d 725 (1944); *United Transport Service Employees* v. *National Mediation Board*, 141 F. 2d 724 (1944).

This widesweeping refusal to inquire into any of the many claims of improper action by the Mediation Board is not justified by the opinion of this Court in the *Switchmen's* case and flies squarely in the face of the interpretation placed thereon by this Court in *Leedom* v. *Kyne*, 358 U.S. 184, 189-190 (1958). This

Court in *Leedom* v. *Kyne* held that the principles announced by the *Switchmen's* case were "controlling" (358 U.S. at 190) to require a holding that the district court had jurisdiction of an original suit in the federal district court to set aside a certification of the National Labor Relations Board on the ground that that Board had violated the National Labor Relations Act by including non-professional employees in the same unit with professional employees.

The court below in its opinion in the instant case (p. 5a, *infra*, Appendix C) distinguished *Leedom* v. *Kyne* by referring to the reasons given in its opinion in the *UNA Chapter, Flight Engineers* case, (294 F. 2d 905) filed the same day. The opinion in the *UNA Chapter, Flight Engineers* case is printed in Appendix D to this Brief, pp. 6a-12a, *infra*. In that opinion the court below seems to say (pp. 10a-11a, *infra*, Appendix D) that *Leedom* v. *Kyne* is not applicable to any case where the Mediation Board did not disobey an express command of the Railway Labor Act and did not confess it had exceeded its power, as the National Labor Relations Board conceded, though fighting jurisdiction, in the *Leedom* v. *Kyne* case. We do believe that the direction to the Mediation Board in Section 2, Ninth of the Railway Labor Act, that it "shall insure the choice of representatives by the employees without interference, influence or coercion." is just as explicit a statutory command as was present in *Leedom* v. *Kyne*. But whether the disobedience was of an express statutory command or of an implied statutory command cannot validly be controlling. Nor is there anything in the language or the reasoning of *Leedom* v. *Kyne* which can possibly be construed as limiting jurisdiction to instances where the administrative agency concedes it has exceeded its statutory powers.

In *Lecdom* v. *Kyne* this Court made jurisdiction of the courts dependent upon the existence of a right conferred by Congress which would be without remedy unless jurisdiction existed. Such a situation exists here. The complaint here alleges that Braniff and United have influenced, interfered with and coerced their respective employees to leave ALSSA and join ALPA (J.A. 9-10). The stewardesses are without any remedy which will rid them of ALPA as their certified bargaining agency unless either they have a direct suit against the Mediation Board or can join the Mediation Board in a suit against Braniff and United, so that a part of the relief from the influence, interference and coercion can include the setting aside of the certification issued by the Mediation Board. The instant suit is both a direct suit against the Mediation Board (J.A. 1-3) and also a suit against Braniff and United for relief from influence, restraint and coercion (J.A. 3-4, 9-11).

The court below cited *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192 (1944) as indicating the remedy available if ALPA's representation of the stewardesses proves inadequate or discriminatory (n. 1, p. 5a, *infra*, Appendix C). No injunction directing ALPA to provide adequate or nondiscriminatory representation can remedy the defect here present because no collective bargaining by stewardesses is possible so long as a union composed of management representatives is recognized as the exclusive spokesman for the stewardesses. No collective bargaining is possible where management sits on both sides of the bargaining table.

3. The question of whether a union composed of management representatives may properly be certified as the representative of the employees whom they su-

pervise is one of importance under the administration of the Railway Labor Act, which has never been but should be decided by this Court. Indeed, if the decision of the court below is to be read as holding that managerial employees may represent non-managerial employees, it would appear to be contrary to the spirit if not the letter of this Court's decisions in the cases of *Texas & N.O.R. Co.* v. *Brotherhood of Clerks*, 281 U.S. 548 (1930) and *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937). There this Court interprets Section 2 of the Railway Labor Act in a manner which clearly excludes a union in which management supervisory employees participate from representing employees whom they supervise. An analysis of the facts in the *Virginian Ry.* case as they are set forth in the lower court opinions 84 F. 2d 641, 643-644, and 11 F. Supp. 621, 624-625, shows that the Sasser statement, held to consitute illegal influence, interference and coercion, was most innocuous interference, restraint and coercion, as compared with that alleged in the instant complaint. If mere indications of employer favor for a union made by a supervisor are prohibited and disqualify an organization as a company union, certainly where the organization was formed by supervisors and its only officers and members to date have been supervisors (see Complaint, Par. 4, J.A. 3), it must be held disqualified.

Under analogous provisions of the National Labor Relations Act (49 Stat. 452, 29 U.S.C. 158) it is firmly established that a union composed of supervisory employees cannot represent non-supervisory employees. Both before and after the 1947 amendment to the National Labor Relations Act, which excluded supervisors from its benefits (61 Stat. 151, 29 U.S.C. 164

(a)), the National Labor Relations Board[4] and the courts[5] have held that completely apart from whether supervisors can bargain for themselves, unions in which supervisors participate are disqualified to represent supervised employes as such supervisory participation constitutes employer interference, restraint and coercion. We believe these rulings are fully applicable here, where the complete domination of the union by management representatives is assured by the fact that the nonsupervisory employees are not members of, nor eligible for membership, in the supervisors union.[6] This Court has repeatedly held that the National Labor Relations Act and the Railway Labor Act impose identical prohibitions on employers with respect to interference, restraint and coercion. This Court refers

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[4] *Douglas Aircraft Co., Inc.*, 53 N.L.R.B. 486, 489 (1943); *Rochester & Pittsburgh Coal Co.*, 56 N.L.R.B. 1760, 1763-1764 (1944); *Alaska Salmon Industry, Inc.*, 78 N.L.R.B. 185, 188 (1948); *American District Telegraph Co.*, 89 N.L.R.B. 1635, 1637 (1950); *Columbia Pictures Corp.*, 94 N.L.R.B. 466, 470 (1951); *Other Trawlers Union*, 100 N.L.R.B. 1187, 1188-1189, 1199 (1952); *Desilu Productions, Inc.*, 106 N.L.R.B. 179, 182 (1953).

[5] *Virginia Ferry Corp.* v. *N.L.R.B.*, 4th Cir., 1939, 101 F. 2d 103, 105-106; *N.L.R.B.* v. *Delaware New Jersey Ferry Co.*, 3rd Cir., 1942, 128 F. 2d 130, 137; *Local 636, Plumbers* v. *N.L.R.B.*, 1961, App. D.C., 287 F. 2d 354, 360-362; *Brotherhood of Transit Employees of Baltimore* v. *Madden*, 4th Cir., 1944, 147 F. 2d 439, 441-442.

[6] Under the ALPA constitution only a "flight deck operating crew member" is eligible for membership (J.A. 3, 176). The stewardesses are not "flight deck operating crew" members. The command authority is vested in all flight officers, with the pilot who serves as captain first in command, the pilot who is first officer second in command and the pilot or engineer who is second officer third in command (J.A. 118-119). Thus all members of ALPA have command authority over stewardesses, who must obey all commands and suffer discipline at the hands of any officer.

to cases under the two acts interchangeably and relies on cases under one act for construction of the other.[7]

4. Under the decisions of this Court in *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks*, 281 U.S. 548 (1930) and *Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515, 545-547 (1937), the federal district courts have jurisdiction of claims of interference, influence or coercion by a carrier subject to the Railway Labor Act. The court below acted directly contrary to these decisions when it held that the district court did not have jurisdiction of the claim that United and Braniff had influenced, interfered with and coerced stewardesses to leave ALSSA and be represented by ALPA in violation of Section 2, Third and Fourth of the Railway Labor Act (J.A. 9-10).

In suggesting that "If appellant's charge of coercion has any substance, appellant can apply for the institution of a criminal prosecution," the court below (p. 6a, *infra*, Appendix C) ignored the holdings in the *Texas & New Orleans* case and in the *Virginian Railway* case, that the federal district courts had jurisdiction to remedy coercion by injunctive relief. The criminal penalties would not restore and preserve to the stewardesses their right to bargain through unions independent of supervisory control. Review should be granted to correct the court below in its holding that only criminal, and not, equitable remedies lie to protect the right to self organization and collective bargaining under the Railway Labor Act.

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[7] *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42-45, 47 (1937); *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 346-347 (1944); *Steele* v. *Louisville & Nashville R.R. Co.*, 32 U.S. 192, 200 (1944); *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 325 U.S. 711, 722, n. 14, 728, n. 25, 733, n. 30, 735, 737 (1945); *N.L.R.B.* v. *Pennsylvania Greyhound Lines Inc.*, 303 U.S. 261, 266-267 (1938).

CONCLUSION

For the foregoing reasons it is urged that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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December 18, 1961.

APPENDIX A

Constitutional and Statutory Provisions Involved

The relevant provisions of the United States Constitution appear in the Fifth Amendment and provide as follows:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *"

The relevant provisions of the Railway Labor Act, as amended (44 Stat. 577, 48 Stat. 926, 45 U.S.C. 151, *et seq.*) are as follows:

"Section 2. * * *

* * * * * * * *

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees

any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * * * * *

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

APPENDIX B

Judgment

Filed July 13, 1961

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1960

Civil 540-61
No. 16,340

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, A LABOR ORGANIZATION, *Appellant*,

v.

NATIONAL MEDIATION BOARD, ET AL., *Appellees*.

Appeal from the United States District Court for the District of Columbia.

Before EDGERTON, WASHINGTON and DANAHER, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: July 13, 1961

APPENDIX C

Opinion of the United States Court of Appeals for the District of Columbia Circuit

---

No. 16,340

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, A LABOR ORGANIZATION, *Appellant*,

v.

NATIONAL MEDIATION BOARD, ET AL., *Appellees*.

Appeal from the United States District Court for the District of Columbia

---

Decided July 13, 1961

Mr. Joseph L. Rauh, Jr., with whom *Mr. Mitchell J. Cooper* was on the brief, for appellant.

Mr. Morton Hollander, Attorney, Department of Justice, with whom *Mr. William H. Orrick, Jr.*, Assistant Attorney General, and *Mr. David C. Acheson*, United States Attorney were on the brief, for appellees, National Mediation Board, et al. *Mr. Harold D. Rhynedance, Jr.*, Assistant United States Attorney, also entered an appearance for appellees, National Mediation Board, et al.

Mr. Stuart Bernstein, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, with whom *Messrs. Robert L. Stern* and *James Francis Reilly* were on the brief, for appellee, United Air Lines, Inc.

Mr. Robert Plotkin, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, with whom *Mr. Stephen I. Schlossberg* was on the brief, for appellee, Air Line Pilots Association, International.

Before EDGERTON, WASHINGTON and DANAHER, *Circuit Judges.*

PER CURIAM: This case is similar in many respects to *UNA Chapter, Flight Engineers' International Association v. National Mediation Board*, No. 16332, decided this day. This, too, is a suit against the National Mediation Board and its members to set aside a determination in a representation case. Here, the Board recognized the stewards and stewardesses of United Airlines as a craft or class. It made a like ruling as to similar employees of Braniff Airlines. Each group voted in elections in which no other group participated. What is complained of is that the Board allowed the Air Line Pilots Association (ALPA) to appear on the ballot. It won both elections. The plaintiff appellant, the Air Line Stewards and Stewardesses Association, brought suit in the District Court, alleging that pilots perform some supervisory and managerial functions in regard to stewards and stewardesses, and hence that their union is ineligible to represent the persons whom they supervise. The short answer is that the Railway Labor Act, 45 U.S.C. 151 *et seq.*, does not forbid this, expressly or by implication.[1] The District Court rightly dismissed the suit for lack of jurisdiction under *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943). Appellant's reliance on *Leedom v. Kyne*, 358 U.S. 184 (1958), is misplaced, for the reasons given in our opinion in *Flight Engineers*.

Nor is any constitutional question presented. The Mediation Board—as distinguished from committees appointed by it—is not required to give a hearing to a protesting union. *See Switchmen's Union v. National Mediation Board, supra* at 304. Appellant's argument to the contrary is untenable. The complaint contains allegations that

[1] If in fact ALPA's representation proves inadequate or discriminatory, persons aggrieved will not lack remedy. *Cf. Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944).

United and Braniff coerced the stewards and stewardesses into voting for ALPA. These allegations seem purely conclusory, and based largely if not wholly on the argument that pilots are part of management. This sort of claim does not create jurisdiction in the District Court to set aside the Board's determination. See, 2 MOORE, FEDERAL PRACTICE para. 12.08, at 2244-45 (2d ed. 1960). If appellant's charge of coercion has any substance, appellant can apply for the institution of a criminal prosecution. See Railway Labor Act, Section 2, Tenth, 45 U.S.C. § 152.

Affirmed.

APPENDIX D

Opinion of the United States Court of Appeals for the District of Columbia Circuit

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No. 16,332

UNA CHARTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, APPELLANT,

v.

NATIONAL MEDIATION BOARD, FRANCIS A. O'NEILL, JR., INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL MEDIATION BOARD, ET AL., APPELLEES.

Appeal from the United States District Court for the District of Columbia

---

Decided July 13, 1961

Mr. Isaac N. Groner, with whom *Messrs. I. J. Gromfine* and *William B. Peer* were on the brief, for appellant. *Mr. Herman Sternstein* also entered an appearance for appellant.

Mr. Morton Hollander, Attorney, Department of Justice, with whom *Mr. William H. Orrick, Jr.*, Assistant Attorney

General, and *Mr. David C. Acheson*, United States Attorney, were on the brief, for appellees, National Mediation Board, et al. *Mr. Carl W. Belcher*, Assistant United States Attorney at the time the record was filed, and *Mr. Harold D. Rhynedance, Jr.*, Assistant United States Attorney, also entered appearances for appellees, National Mediation Board, et al.

Mr. Stuart Bernstein, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, with whom *Messrs. Robert L. Stern* and *James Francis Reilly* were on the brief, for appellee, United Air Lines, Inc.

Mr. Benjamin M. Shieber, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Benedict F. Fitzgerald, Jr.*, was on the brief, for appellee, Air Line Pilots Association, International.

Mr. William J. Potts, Jr., with whom *Mr. Andrew G. Haley*, was on the brief, for appellee, Richard L. Keller, *et al.*

Messrs. Clarence M. Mulholland, Edward J. Hickey, Jr., and *William G. Mahoney* filed a brief on behalf of Railway Labor Executives' Association as *amicus curiae*, urging reversal. *Mr. James L. Highsaw, Jr.*, also entered an appearance for Railway Labor Executives' Association, as *amicus curiae*.

Before EDGERTON, WASHINGTON and DANAHER, *Circuit Judges*.

WASHINGTON, *Circuit Judge*: This is a labor case, in which the central question is whether the Federal courts have jurisdiction to review a challenged order of the National Mediation Board. The UNA Chapter, Flight Engineers' International Association, AFL-CIO (FEIA), brought suit in the United States District Court for the District of Columbia against the National Mediation Board (NMB) and its members, the Air Line Pilots Association,

International (ALPA), and United Air Lines (United). The complaint said that the litigation was brought "to enforce the fundamental policy of the Railway Labor Act . . . and to enjoin defendants . . . from violating the Act by arrogating the right to create a new craft. . . ." Some 200 of United's flight engineers holding commercial pilot qualifications were permitted to intervene (the Keller group).

The basic controversy arose when ALPA requested that the NMB investigate an alleged representation dispute among United's pilots and flight engineers, theretofore represented by ALPA and FEIA, respectively; that it determine that all "flight deck personnel" (comprising both pilots and flight engineers) were the appropriate "craft or class" for representation purposes; that it hold a representation election in this "craft or class"; and that it certify the winner as the bargaining representative. Pursuant to Section 2, Ninth, of the Railway Labor Act,[1] the NMB designated a committee of three neutral persons, empowered by that section of the Act "after hearing . . . [to] designate the employees who may participate in the election.". One J. Glenn Donaldson was appointed chairman, and hearings commenced on December 1, 1959, the primary issue being the relationship and duties of the pilot, copilot and flight engineer. It was decided by the parties and the committee that visits should be made to United's training center to see how this three-man group actually functioned on piston and jet aircraft. Such visits were to be conducted only in the presence of ALPA and FEIA representatives. Subsequently, Mr. Donaldson, while on a personal trip aboard a United aircraft, accepted an invitation from the captain to sit in the cockpit and observe flight deck operations; it is alleged that the procedures shown him were atypical in that the personnel present (including a flight engineer) performed other than their accustomed duties.

[1] Added by 48 STAT. 1188 (1934), 45 U.S.C. § 152, Ninth (1958), as made applicable to airline common carriers, 49 STAT. 1189 (1936), 45 U.S.C. §§ 181-82 (1958).

At the next hearing session, the FEIA moved that Donaldson resign from the committee for participating in this off-the-record action. He refused, and the NMB denied a motion to remove him. The committee thereafter observed United's operations under the conditions agreed upon.

After 40 days of hearings, 5121 pages of testimony, and 595 exhibits, the committee on January 17, 1961, found that pilots, copilots, and flight engineers at United comprised the personnel of a single "craft or class" entitled to vote in a representation election. An election was held among this group, at which ALPA received 1682 votes and FEIA 58 votes. A certificate was thereupon issued by the Board to ALPA. The instant suit had already been commenced. Upon motion of the defendants-appellees the District Court ruled that it had no jurisdiction over the subject matter of the dispute, that no substantial constitutional question was presented, and that the complaint failed to state a claim upon which relief could be granted. It therefore dismissed the complaint. This appeal followed.

The court did not err when it dismissed the complaint for lack of jurisdiction. Under the Railway Labor Act only the NMB (or the committee designated by it) has the power to make craft or class determinations. *Switchmen's Union v. NMB*, 320 U.S. 297 (1943). The right given to employees is that of designating, by a majority of those comprising a "craft or class," their representatives. See 320 U.S. at 300-301. It has become well settled that in making "craft or class" determinations, the NMB may regroup, amalgamate, or splinter "historic" bargaining groups, taking into account technological and functional changes, and that the decision of the Board in setting up a "class" for representation in a jurisdiction dispute is unreviewable in the courts. *Brotherhood of Ry. & S.S. Clerks v. United Transp. Serv. Employees*, 320 U.S. 715, reversing 78 U.S.App.D.C. 125, 137 F. 2d 817 (1943); *Switchmen's Union v. NMB*, *supra*, reversing on jurisdictional grounds 77 U.S.App.D.C. 264, 135 F. 2d 785; *United Transp. Serv. Employees v.*

NMB, 85 U.S.App.D.C. 352, 179 F. 2d 446 (1949); and *General Comm. of Adjustment* v. *Missouri-Kan.-Tex. R. Co.*, 320 U.S. 323 (1943).[2]

Appellant alleges that the Board decision deprives the flight engineers, a minority group, of any free choice of representatives, destroys an historic "craft," and flies in the face of the "dominant" industry bargaining pattern. Just such arguments were made to and accepted by this court in *Brotherhood of Ry. & S.S. Clerks* v. *United Transp. Serv. Employees, supra.* The Supreme Court reversed, per curiam, 320 U.S. 715, citing *Switchmen's Union* and *General Comm.* v. *Missouri-Kans.-Tex. R. Co., supra.* Appellant stands in no better position.

Appellant urges, however, that jurisdiction exists under the Supreme Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958). We cannot agree. In *Leedom* the Supreme Court carefully differentiated *Switchmen's Union* from the case before it, pointing out that the latter did not involve "review" of agency action, but the striking down of action in excess of delegated powers, in flat violation of the controlling statute—there the Labor Management Relations Act. See 358 U.S. at 188-190. It should be noted, also, that in *Leedom* v. *Kyne* the National Labor Relations Board did not deny that it had contravened its governing statute. See 358 U.S. at 187. No such admission is made here, and appellant has not pointed out any clear statutory limitation expressed by the Railway Labor Act which has been violated by the NMB. The action of the NMB, in contrast to

[2] Thus, to the extent its action is within its powers, NMB decisions are not subject to "review" by injunction suit, declaratory judgment action under 28 U.S.C. § 2201 (1958), or suit under Section 10 of the Administrative Procedure Act, 60 STAT. 243 (1946), 5 U.S.C. § 1009 (1958). *American Air Export & Import Co.* v. *O'Neill*, 95 U.S. App. D.C. 274, 221 F.2d 829 (1954); *Kirkland* v. *Atlantic Coast Line R. Co.*, 83 U.S. App. D.C. 205, 167 F.2d 529 (1948); *United Transp. Serv. Employees* v. *NMB*, 85 U.S. App. D.C. 352, 179 F.2d 446 (1949).

that of the NLRB in *Kyne*, adhered to the statutory pattern prescribed; the correctness of its delineation of the bargaining class is not open to judicial review.

Apart from the certification issue, appellant urges that a significant constitutional issue exists warranting the exercise of jurisdiction by the District Court.[3] The constitutional issue—denial of Due Process—is said to arise from the extra-record view of cockpit procedures in a United aircraft by the chairman of the committee, as described earlier in this opinion. Appellant argues that since the statute requires a "hearing," any *ex parte* investigation constitutes a totally invalidating irregularity. This does not follow, however, for appellant is attempting to place on the word "hearing" a unitary meaning of "adjudicatory hearing," which is unwarranted by the statutory scheme. The purpose of the Board (and similarly of its designated committee) is to find facts. See *Switchmen's Union* v. *NMB*, *supra* at 301. It does not fix rights and liabilities between parties, but "investigates," and determines the factual circumstances of a dispute; its functions are essentially legislative or rulemaking, and not adjudicative, for it defines "craft or class" and the rules for elections. *Ibid*; cf. *Inland Empire Dist. Council, Lumber Workers* v. *Millis*, 325 U.S. 697, 708-709 (1945). In legislative or rulemaking hearings, the scope of "official notice" is quite broad, limited only by essentials of fair notice and opportunity to rebut. See *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 530 (1946); *Market St. R. Co.* v. *Railroad Comm'n*, 324 U.S. 548, 561-562 (1945); 2 DAVIS, ADMINISTRATIVE LAW § 15.12 (1958). Thus, it is essential to appellant's position that it demonstrate, by more than the

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[3] See *United Transp. Serv. Employees* v. *NMB*, 85 U.S. App. D.C. 352, 179 F.2d 446 (1949).

[4] See *CAB* v. *Delta Air Lines, Inc.*, — U.S. — (29 U.S.L. WEEK 4731, 4734, June 12, 1961), quoting from COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 159.

conclusory allegations of its complaint, that it was prejudiced by this extra-record notice. See, e.g., *United States* v. *Pierce Auto Freight Lines, supra.* This it has not done. There is no issue here of nondisclosure or corruption.[5] From the time the committee hearings resumed after the challenged flight, the chairman and all parties were on notice of the flight, what occurred on it, and the fact that the procedures seen may have been atypical or "rigged." Following the incident, the committee took voluminous testimony and eventually issued a report mainly relying for its conclusions upon the relationship of the cockpit crew in jet aircraft,[6] and United's program for training flight engineers to become pilots. Donaldson's flight was not referred to. There was ample opportunity for appellant to place in the record any information considered necessary to rebut its effects. Under all the circumstances, we conclude that appellant has not presented a substantial constitutional question upon which the jurisdiction of the District Court could be grounded. *Inland Empire Dist. Council, Lumber Workers* v. *Mills, supra; United States* v. *Pierce Auto Freight Lines, supra; Market St. R. Co.* v. *Railroad Comm'n, supra; American Trucking Ass'ns* v. *Frisco Transp. Co.*, 358 U.S. 133, 144 (1958); cf. *Carter* v. *Kubler*, 320 U.S. 243 (1943).

For these reasons, the order of the District Court dismissing the complaint is hereby

Affirmed.

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[5] Compare *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292 (1937); *Sangamon Valley Television Corp.* v. *United States*, 106 U.S. App. D.C. 30, 269 F.2d 221 (1959).

[6] Donaldson's flight was on a piston aircraft.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 614

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL,

Petitioner,

vs.

NATIONAL MEDIATION BOARD; FRANCIS A. O'NEILL, JR., INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL MEDIATION BOARD; ROBERT O. BOYD, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; UNITED AIR LINES, INC.; AND BRANIFF INTERNATIONAL AIRWAYS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF UNITED AIR LINES, INC. IN OPPOSITION.

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IN THE

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OCTOBER TERM, 1961.

No. 614.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL,

Petitioner,

vs.

NATIONAL MEDIATION BOARD; FRANCIS A. O'NEILL, JR., INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL MEDIATION BOARD; ROBERT O. BOYD, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, INDIVIDUALLY, AND AS MEMBER OF THE NATIONAL MEDIATION BOARD; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; UNITED AIR LINES, INC.; AND BRANIFF INTERNATIONAL AIRWAYS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF UNITED AIR LINES, INC. IN OPPOSITION.

OPINION BELOW, JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The petition adequately states the Opinion Below, Jurisdiction, and Constitutional and Statutory Provisions Involved.

QUESTIONS PRESENTED.

1. Whether the Railway Labor Act prohibits a labor organization which represents air line pilots, some of whom exercise command functions during flight over other crew members including stewardesses, from also representing stewardesses.

2. Whether the National Mediation Board denied petitioner due process by refusing to hold a formal hearing on the above question.

STATEMENT.

A labor organization known as the Air Line Stewards and Stewardesses Association ("ALSSA") had been recognized by respondent United Air Lines, Inc. since 1946 as the duly authorized representative for the purposes of the Railway Labor Act of the craft or class of United's employees known as stewards and stewardesses. This organization had been affiliated with respondent Air Line Pilots Association, International ("ALPA"). ALPA is the duly authorized representative for all pilots in the employ of United.

In 1950 a dispute developed between ALSSA and ALPA concerning, in part, the nature of the affiliation between them. As a result of the dispute, two groups claimed to be the legally constituted officers of ALSSA and each group claimed representation rights for United's stewards and stewardesses. Legal action was commenced between the two in the Circuit Court of Cook County, Illinois. As a consequence, United was unable to ascertain with which representative it should deal, and United's stewardesses were without any effective representation (J. A. 243-4, 268, 305-6).

While the issue of the representation rights of United's

stewards and stewardesses was thus stalemated, ALPA made application to respondent National Mediation Board to investigate a representation dispute under Section 2, Ninth* of the Railway Labor Act (45 U. S. C. § 152, Ninth) among this craft or class of United's employees. By this application ALPA sought a Board-conducted election among the stewards and stewardesses in an effort to become the bargaining representative for this group (J. A. 306).

By letter dated January 30, 1961, petitioner (one of the two factions claiming to be ALSSA) asked the Mediation Board to dismiss ALPA's application on the ground, among others since abandoned, that the duties and responsibilities of pilots as related to stewardesses "[were] basically of a supervisory character," and hence a labor organization representing the pilot craft or class could not also represent the stewardess craft or class (J. A. 92). In the same letter petitioner requested the Board to schedule a "formal hearing" to enable it to introduce evidence on the issues raised in its letter (J. A. 96).

The Board replied on February 10, 1961 (J. A. 99),* stating that the Railway Labor Act contained "no restriction * * * on who may be certified as the representative of the employees or a carrier subject to the Act" (J. A. 99). The letter also stated:

> "However, the Board for many years has had a policy of not certifying a carrier or an officer of a carrier as an employee representative for the purposes of the Act. The Board is of the opinion that the Air Line Pilots Association is not barred, under such

*This section is set out in Appendix A to the petition.

*Petitioner's letter to the Board dated January 30, 1961, and the Board's reply of February 10, 1961, are duplicates, except in minor respects, of letters respecting the representation of stewardesses employed by respondent Braniff International Airways (J. A. 85, 97).

policy, from making application for investigation of a representation dispute involving the employees in question. The Board must, therefore, decline your request for a formal hearing on this subject." (J. A. 99-100).

On February 20, 1961, petitioner filed its complaint (J. A. 1-12) in the District Court for the District of Columbia seeking a declaration that the Railway Labor Act did not confer jurisdiction upon the Mediation Board to certify ALPA as a representative of the stewardesses craft or class and praying that the Court enjoin the Board from conducting any election or certifying the results thereof.

The complaint charged that United had interfered with, influenced and coerced its stewardesses "through the actions of [its] pilots," in violation of Section 2, Third, of the Railway Labor Act (J. A. 9). There was no allegation of independent acts of influence or coercion by United aside from this imputation to it of the conduct of its pilots. United has denied that any of its officials engaged in any organizing activity among the stewardesses (J. A. 307), and this denial has not been challenged.*

The complaint repeated the claim made to the Mediation Board that the pilots were supervisors and representatives of the carrier in dealing with its stewardesses, relying on Section 40.351(c) of the Civil Air Regulations (14 C. F. R. 82) (J. A. 7).

Although the complaint suggests that the Civil Air Regulations provide that all pilots "shall be in command

* This denial is contained in an affidavit prepared by Charles M. Mason, United's then Vice President-Employee Relations. This affidavit was filed by United in opposition to petitioner's motion for a temporary restraining order and preliminary injunction, and was subsequently submitted in support of the motion for summary judgment filed by the Mediation Board (J. A. 321).

of the crew," the regulation is in fact limited to the first pilot, or pilot in command, only. The regulation provides:

> "*Responsibility of pilot in command.* The pilot in command shall during flight time be in command of the airplane and crew and shall be responsible for the safety of the passengers, crew members, cargo, and airplane" (14 C. F. R. 82).

The interpretation by the Civil Aeronautics Board, also relied on by petitioner in the complaint, is as follows:

> "The Board interprets and construes § 40.351(c) as conferring *on the pilot in command*, with respect to matters concerning the operation of the airplane, full control and authority without limitation over all other crew members and their duties *during flight time*, whether or not he holds a valid certificate authorizing him to perform the duties and functions of such other crew member" (14 C. F. R. 82. Emphasis added).

The complaint also alleged that United had vested in its pilots authority to remove stewardesses from active duty, to recommend and discharge, to discipline them, to assign them duties, to direct their performance of duties and to recommend that they be rewarded or disciplined (J. A. 7-8). This allegation, which was not verified, was denied in the Mason affidavit, which states that United pilots have no authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline any other employee or to adjust their grievances or to effectively recommend such action. This affidavit states that United's first pilots are restricted in their command function to the necessities of flight operations as required by federal regulation (J. A. 309).

It was alleged that the failure of the Mediation Board to conduct a hearing as requested by petitioner was a denial to it of due process (J. A. 8).

After refusal of the District Court to restrain the Board

in its holding of the election an election among United's stewardesses was conducted with the following results (J. A. 351):

Number of Employees on Eligible List	1223
ALPA	891
AL88A	178
Transport Workers Union of America, AFL-CIO	4
International Brotherhood of Teamsters	1
Number of Void Ballots	7

United and ALPA had filed motions to dismiss the complaint and the Mediation Board had filed a motion for summary judgment or to dismiss, with supporting affidavits (J. A. 242, 321, 335). On May 5, 1961, the District Court granted the Mediation Board's motion for summary judgment and United and ALPA's motion to dismiss, on the ground that the Court was without jurisdiction over the subject matter (J. A. 352).

On the same day, a stay of certification of ALPA by the Mediation Board was requested by petitioner from the Court of Appeals for the District of Columbia, which request was denied (J. A. 355, 364).

On July 13, 1961, the Court of Appeals, in a *per curiam* opinion, affirmed the order of the District Court. The Court held that the Mediation Board was acting within its statutory authority, and that "[T]he District Court rightly dismissed the suit for lack of jurisdiction under *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943)." (Appendix C to Petition).

ARGUMENT.

I.

Petitioner's first reason for granting the writ is that its constitutional right to due process was violated when the Mediation Board declined petitioner's request for a "formal hearing" on the issue raised in its letter of January 30, 1961 to the Board (J. A. 91, 96). Petitioner acknowledges (Pet. 14) that this Court held in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 304 (1943) that the Mediation Board—as distinguished from committees appointed by it—is not required to conduct a hearing in its investigatory duties under Section 2, Ninth. Petitioner suggests, however, that the Court could not have intended its ruling in *Switchmen's* to apply where the Board is presented with "disputed factual issues" (Pet. 11).

The *Switchmen's* opinion says that (320 U. S. 297, 304):

> "While the Mediation Board is given specified powers in the conduct of elections, there is no requirement as to hearings. * * * And its only ultimate finding of fact is the certificate."

The statement that "there is no requirement as to hearings" obviously applies to the entire proceeding "in the conduct of elections", including whatever factual aspects are involved. The passage could not have been intended to be limited to those factual issues as to which the parties were in agreement, as petitioner's argument implies, for no hearing would then be required in any event.

Furthermore, even under petitioner's interpretation of *Switchmen's*, this case raises no factual issue which would have justified a formal hearing. In its letter to the Board

(J. A. 91) petitioner asked that ALPA be ruled ineligible to represent the stewardesses because of the "supervisory" status of its pilot members. This contention was based upon an erroneous theory of law, since the Act places "employees" and "subordinate officials" in the same category (Section 1, Fifth; 45 U. S. C. § 151, Fifth), does not bar them from being represented by the same union, and, as the Board stated, imposes no restriction "on who may be certified as the representative" of a craft or class under the Act (J. A. 99). The Board's interpretation of its own policy against certifying as an employee representative a carrier or officer thereof (which clearly meant corporate officials as distinguished from personnel in command of individual aircraft) as inapplicable to airline pilots raised no factual question.

II.

The *Switchmen's* case, 320 U. S. 297 (1943) held that determinations of the National Mediation Board in representation cases were not subject to judicial review. As did the petitioner in *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board*, 294 F. 2d 905 (App. D. C. 1961), No. 531, October Term, 1961, *certiorari denied* January 8, 1962, petitioner here argues that its case comes under *Leedom* v. *Kyne*, 358 U. S. 184 (1958) which held that a certification of the National Labor Relations Board could be reviewed to see if it contravened a provision of the applicable statute. But no provision of the Railway Labor Act precluded the Mediation Board from holding that stewardesses could be represented by ALPA if they made their preference known in a duly conducted election. Indeed, for the Board to have held otherwise would have been in violation of the statute.

Petitioner's theory is that because pilots exercise in-flight command functions over stewardesses, the pilots are exercising management prerogatives, and that their repre-

sentation of the stewardesses accordingly constitutes interference, coercion and influence by the carrier in violation of Section 2, Third and Fourth of the Act (45 U. S. C. § 152, Third, Fourth). Since pilots are also in command of co-pilots and flight engineers, and conductors of trains are similarly in command of brakemen and flagmen, petitioner's reasoning would make it unlawful for pilots to be in the same union with co-pilots or flight engineers, or conductors to be in the same union with brakemen or flagmen. The contrary has been the practice since the Railway Labor Act was first enacted. See National Mediation Board Annual Report, 1960, pp. 84-86, 90; Mason Affidavit, par. 12, J. A. 309. Indeed, in the *Flight Engineers'* case, *supra*; in which certiorari was denied by this Court on January 8, 1962, the grouping of pilots, co-pilots and flight engineers in a single bargaining unit was upheld.

Clearly, it does not follow from the exercise of in-flight command functions over stewardesses that pilots occupy the status of management with respect to such stewardesses. Petitioner's assertion that "inasmuch as pilots are supervisors of stewards and stewardesses [they] stand in the relation of employers * * *" (J. A. 94) is simply a *non sequitur* as to any of the aspects of management pertinent to the choice of a bargaining representative. Pilots may be included in a separate bargaining unit, as are conductors on the railroads, but they can hardly be regarded as a part of corporate management. This is evident from the number of strikes which ALPA has called against various airlines. Petitioner's entire case rests on this unwarranted treatment of the pilots' command functions as the equivalent of management by the carrier, and it falls with the weight of the premise upon which it rests.

The distinction which petitioner would draw between supervisory and non-supervisory personnel, while manifest in the National Labor Relations Act on which petitioner

relies, simply does not appear in the Railway Labor Act. To the contrary, the Railway Labor Act defines an employee of a carrier as any person who performs work as "an employee or subordinate official" (Sections 1, Fifth and 201; 45 U. S. C. §§ 151, Fifth and 181), and its provisions do not treat the two types of employees differently in any way or prevent them from choosing the same bargaining representative if they so desire. From a corporate or labor-management point of view, a pilot is not even a subordinate official, much less a management representative.*

The Railway Labor Act provision is to be contrasted with the definition of employee found in § 2(3) of the National Labor Relations Act (29 U. S. C. § 152(3)), which specifically excludes therefrom "any individual employed as a supervisor," and with other provisions of that Act setting supervisors apart from other employees, *viz.*, § 2(11), 29 U. S. C. § 152(11); § 2(13), 29 U. S. C. § 152 (13); § 14(a), 29 U. S. C. § 164(a).

In an effort to bring its case within *Leedom* v. *Kyne*, petitioner asserts that the Mediation Board violated the "clear and mandatory provisions" of the Railway Labor Act. But *Leedom* v. *Kyne* was concerned with a specific provision in the National Labor Relations Act which prohibited including professional and non-professional employees in the same bargaining unit unless a majority of the professional employees approved by separate vote (Section 9(b)(1), 29 U. S. C. § 159(b)(1)). There is no comparable provision in the Railway Labor Act prohibiting

*"The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151, *et seq.*" *Brotherhood of Railway Trainmen* v. *Chicago River and Indiana Rd. Co.*, 353 U. S. 30, 31 (1957).

members of a flight (or train) crew, or even subordinate officials, from being in the same class or craft as the other crew members whom they command en route. And this case does not involve putting supervisory and non-supervisory employees in the same bargaining unit, but only whether concededly separate bargaining units can choose to be represented by the same union. Thus *Leedom* v. *Kyne* is completely irrelevant.

Petitioner can point to no provision in the Railway Labor Act which the Mediation Board has flouted. There is here, no administrative "action taken in excess of delegated powers" as occurred in *Kyne* (358 U. S. 184, 190). On the contrary, as we have shown, the Board clearly acted within its statutory authority in ruling that ALPA was eligible to represent United's stewardesses.

This case, as well as the *Flight Engineers* case, *supra*, demonstrates the wisdom of the *Switchmen's* doctrine. If Mediation Board certifications are reviewable, any unsuccessful union which believes it has anything to gain by litigation or delay can prolong the uncertainty in labor relations which accompanies a representation dispute by instituting litigation, no matter how frivolous or unsubstantial its claim. Despite the ingenuity of petitioner's able counsel, this case is a good example. Even though, if review were generally available, a court might on occasion overturn a Board certification, the public benefit therefrom would be far overbalanced by the public injury resulting from general delay in the settlement of representation disputes on the railroads and airlines.

CONCLUSION

For the reasons hereinabove set forth, respondent United Air Lines, Inc., respectfully prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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No. 614

In the Supreme Court of the United States

OCTOBER TERM, 1961

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS, NATIONAL MEDIATION BOARD, O'NEILL, EDWARDS AND BOYD IN OPPOSITION

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623189—62

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 4a)[1] is reported at 294 F. 2d 910.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1961 (Pet. App. 3a). A timely petition for rehearing was denied by the court *en banc* on Sep-

[1] "Pet. App." references are to the appendix to the petition for a writ of certiorari. "R" references are to the joint appendix in the court of appeals, which has been filed in this Court as part of the record.

tember 20, 1961. The petition for a writ of certiorari was filed on December 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether both courts below correctly held that the National Mediation Board's finding that the Air Line Pilots Association was eligible to appear on the ballot for election as the authorized representative of the craft or class of stewards and stewardesses was not subject to judicial review.

2. Whether the National Mediation Board was required to hold a hearing in connection with its determination that the Air Line Pilots Association, if chosen by a majority of the stewards and stewardesses employed by Braniff and United Air Lines, was eligible to represent those stewards and stewardesses.

STATUTE INVOLVED

Railway Labor Act, Section 2, Third, Fourth and Ninth, 45 U.S.C. 152:

> § 152. General Duties.
>
> * * * * *
>
> Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by

interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization * * *.

* * * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the in-

dividuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

STATEMENT

The present litigation stems from a dispute between two unions contending for the right to represent the craft or class of stewards and stewardesses of Braniff and United Air Lines.

1. *Proceedings Before the National Mediation Board.* On January 12, 1961, the Air Line Pilots

Association (ALPA) filed an application with the National Mediation Board "for investigation of a representation dispute, under Section 2, Ninth of the Railway Labor Act" among stewardesses employed by Braniff Airways (R. 13, 311). The application revealed that over 84% of these employees had signed valid authorization cards for ALPA (R. 311–313), although at the time their designated representative was the Air Line Stewards and Stewardesses Association (ALSSA), petitioner herein (R. 13). On January 20, 1961, ALPA filed a similar application with respect to the stewards and stewardesses employed by United Air Lines (R. 14, 315–316) who were also represented by ALSSA. Eighty percent of these employees had furnished ALPA with valid authorization cards (R. 316).

On January 25, 1961, the Board notified the carriers and petitioner union of the filing of the applications and "invited [the president of petitioner union] to submit any statement he may care to make with respect to [each] application" (R. 13–14; see 311, 316). ALSSA responded by objecting to the "standing [of ALPA] to appear on an election ballot involving a representation dispute among the craft or class of stewards and stewardesses * * *" (R. 91; see R. 85–96). It stated, as grounds for its objection, that ALPA is composed of persons who stand in the relation of the carrier, its agents, supervisors and management to the stewards and stewardesses and that it would violate the Railway Labor Act, particularly Section 2, Third and Fourth, for that Association to represent the craft or class of stewards and steward-

esses. ALSSA requested a formal hearing before the Board at which time it would "introduce evidence on the foregoing and other relevant matters" (R. 90, 96).

At an executive meeting on February 7, 1961, the full membership of the Board considered petitioner's contentions with respect to the eligibility of ALPA to represent stewards and stewardesses as well as its request for a hearing (R. 97, 99). By letters dated February 9 and 10, 1961, the Board informed petitioner that in accordance with Section 2, Ninth, of the Railway Labor Act a preliminary investigation of the representation dispute had been made, that ALPA was not barred from representing the stewards and stewardesses of United and Braniff, and that ballot elections would be conducted (R. 97–100). With regard to ALPA's eligibility, the Board stated (R. 97–98):

> It will be noted there is no restriction contained in the language of the Act on who may be certified as the representative of the employees of a carrier subject to the Act. However, the Board for many years has had a policy of not certifying a carrier or an officer of a carrier as an employee representative for the purposes of the Act. The Board is of the opinion that the Air Line Pilots Association is not barred, under such policy, from making application for investigation of a representation dispute involving the employees in question. The Board must, therefore, decline your request for a formal hearing on this subject.

Subsequently the Board conducted secret ballot elections in which eligible stewards and stewardesses of each air line voted as a separate craft or class whether ALSSA, ALPA, or some other organization or indi-

vidual should represent them. The official count of ballots in the Braniff election showed 8 votes for ALSSA and 214 for ALPA (R. 351). In the United election, 891 stewards and stewardesses voted for ALPA, 178 for ALSSA (R. 351). Thereafter the Board certified ALPA as the representative of stewards and stewardesses at Braniff (R. 351) and at United.

2. *Proceedings in the Courts Below.* Prior to the completion of the elections and certifications, petitioner on February 20, 1961, filed a complaint for an injunction and declaratory relief in the District Court for the District of Columbia, against the Board, its members, ALPA, United and Braniff (R. 1). The complaint asserted that the Board had exceeded its jurisdiction under the Railway Labor Act in holding that ALPA was eligible for election as representative of the craft or class of stewards and stewardesses and, further, that the Board's refusal to afford petitioner union a hearing in advance of its action was a denial of due process (R. 8). In addition, the complaint also alleged that both United and Braniff, acting through their pilots and in collusion with ALPA, had restrained, coerced and interfered with the stewards' and stewardesses' right to self-organization by attempting to induce them to join ALPA (R. 9).

On February 28, 1961, the Board and its individual members moved to dismiss the complaint or, in the alternative, for summary judgment on grounds, *inter alia,* that the district court had no jurisdiction to review the Board's determination under the decision in *Switchmen's Union* v. *National Mediation Board,* 320

U.S. 297 (R. 321). Affidavits attached to the government's motion set forth the administrative background, procedures and actions in the two representation disputes, as outlined above (R. 311–317).

On May 5, 1961, the district court granted the government's motion for summary judgment on the ground that it was "without jurisdiction over the subject matter" in "light of the decision in *Switchmen's Union* * * *" (R. 352). At the same time it granted motions, filed by United and ALPA, to dismiss (R. 352–353).

On July 13, 1961, the court of appeals affirmed *per curiam*, stating (Pet. App. 5a):

> Here, the Board recognized the stewards and stewardesses of United Airlines as a craft or class. It made a like ruling as to similar employees of Braniff Airlines. Each group voted in elections in which no other group participated. What is complained of is that the Board allowed the Air Line Pilots Association (ALPA) to appear on the ballot. It won both elections. The plaintiff-appellant, the Air Line Stewards and Stewardesses Association, brought suit in the District Court, alleging that pilots perform some supervisory and managerial functions in regard to stewards and stewardesses, and hence that their union is ineligible to represent the persons whom they supervise. The short answer is that the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, does not forbid this, expressly or by implication. The District Court rightly dismissed the suit for lack of jurisdiction under *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943).

With respect to the contention that the Board was required to grant a hearing, the court of appeals declared that the "Mediation Board—as distinguished from committees appointed by it—is not required to give a hearing to a protesting union. See *Switchmen's Union* * * *, *supra* at 304" (Pet. App. 5a).

ARGUMENT

This petitioner seeks review of the issue decided by this Court in 1943 in *Switchmen's Union* v. *National Mediation Board, supra*—whether the National Mediation Board's determinations in exercise of its mandatory power under Section 2, Ninth, of the Railway Act are subject to judicial review. As petitioner acknowledges (Pet. 12) and as recognized by the court of appeals (Pet. App. 5a), a similar issue was presented in two cases in which this Court denied petitions for certiorari on January 8, 1962, *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board*, No. 531, and *WES Chapter, Flight Engineers' International Association* v. *National Mediation Board*, No. 540. In each of those cases the issue was reviewability of the Board's determination that flight deck crew members, including pilots and flight engineers, are members of the one craft or class eligible under Section 2, Ninth, to select a common representative for collective bargaining. Here, it is the reviewability of the determination that, contrary to petitioner's allegations, the Air Line Pilots Association is eligible to appear on the ballot for election as the authorized representative of the

craft or class of stewards and stewardesses.[2] The difference in the determinations made by the Board—a difference between who is eligible to vote in a representation election and what groups or individuals are eligible to appear on the ballot—does not change the issue as to which review is sought. It remains the availability or scope of judicial review. Thus, the government's brief in opposition filed December 1961 in No. 531 stated (p. 9):

> This Court, over eighteen years ago, in *Switchmen's Union* and two other cases decided the same day, made it perfectly clear that issues arising under Section 2, Ninth, of the Railway Labor Act—*including questions as to who is entitled to represent the craft,* who are members of it, or how the bargaining class generally is to be delineated—have been delegated by Congress to the NMB for settlement and are not reviewable in the courts. [Emphasis added.]

Under the circumstances, the factors set forth in our brief in No. 531 in support of the denial of certiorari are equally pertinent here and warrant similar action by this Court.

Petitioner here, as did the unsuccessful petitioners in the *UNA* and *WES Chapter* cases, cites *Leedom* v. *Kyne,* 358 U.S. 184, in an effort to avoid the holding

[2] In the *UNA* and *WES Chapter* cases the union complained because the Board's determination required engineers to vote with pilots in selecting a representative. Here the stewards and stewardesses voted as a separate craft or class and overwhelmingly chose ALPA, the pilots' union, as their representative (*supra,* p. 7). Petitioner's complaint is that ALPA should not have been permitted on the ballot.

in *Switchmen's Union*. However, *Leedom* v. *Kyne* is equally inappropriate as a precedent warranting judicial review and should be rejected for the reasons set forth in the government's brief in opposition in No. 531. In the instant case, the Board violated no statutory prohibition. Petitioner's assertion to the contrary rests on two contentions: that ALPA is composed of persons who stand in the relation of the carrier, its agents, supervisors and management to stewards and stewardesses and that the Railway Labor Act, particularly Section 2, Third and Fourth, bars such non-supervisory employees from selecting the Association as their representative (R. 5). Both contentions are without merit. Thus, the Board found as a fact that ALPA is not composed of persons who stand in the relation of the carrier or its officers to stewards and stewardesses (R. 97–100). In addition, both the Board and the court of appeals pointed out that the "Railway Labor Act, 45 U.S.C. § 151 *et seq.*, does not forbid * * * expressly or by implication" certification of a union composed of persons who "perform some supervisory and managerial functions in regard to stewards and stewardesses * * * to represent the persons whom they supervise" (Pet. App. 5a; see R. 97–100).[3]

[3] Since the employees here chose ALPA as their bargaining representative by decisive majorities, petitioner is in the position of attempting to nullify the expressed desire of the precise groups it seeks to represent. Rather than the Board's certification being in violation of the Act, it would seem to be peti-

The Board's determination that ALPA was eligible to represent these employees if elected by them is precisely the type of determination that Congress, as noted in *Switchmen's Union*, left to the Board's expert and expeditious judgment without judicial review. Just as it was necessary in that case for the Board in exercise of its power under Section 2, Ninth, to determine the composition of the bargaining unit before the election could be conducted, it was necessary here for it to determine the competency of ALPA to appear on the ballot. The filing of the application by ALPA put the Board on official notice of the existence of the representation dispute and compelled it to discharge its mandatory power under Section 2, Ninth, to investigate and settle the dispute. The Board's determination was made in exercise of its established powers under the statute and is immune from judicial review.

2. The judicial review issue presented by the instant petition does differ in one respect from that presented in the *UNA* and *WES Chapter* cases. Here, the Board denied the contentions of petitioner with respect to ALPA's eligibility after conducting an investigation during which petitioner was afforded a full opportunity to supply written materials in support of its position, but without holding a hearing. In both *UNA* and *WES Chapter* a committee appointed by the Board had held a hearing with respect to the

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tioner's position which is contrary to the policy expressed by Section 2, Fourth, that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class * * * (*supra*, p. 3).

allegations of the Flight Engineers' Association that pilots and flight engineers were members of different crafts. This distinction does not warrant a different result, however.

As recognized by the court of appeals, the statute does not require a hearing except where, as in the *UNA* and *WES Chapter* cases, the Board chooses to appoint a committee to make determinations in its place (Pet. App. 5a). In accordance with the statute, it has been the Board's long standing administrative practice to exercise its powers under Section 2, Ninth, after conducting an investigation, in the course of which all parties may submit written proofs but without holding a hearing. This practice has uniformly received judicial approval beginning with *Switchmen's Union, supra*, at 304, where this Court stated: "While the Mediation Board is given specified powers in the conduct of elections, there is no requirement as to hearings." Appellant's argument to the contrary is, as found by the court below, "untenable" (Pet. App. 5a) and does not present an issue warranting review.

3. Wholly apart from the foregoing considerations, it is clear that petitioner's general assertion that stewards and stewardesses were subject to coercion by ALPA (R. 88, 94) did not require a hearing by the Board or create jurisdiction in the district court to set aside its determination. In its letters to the Board setting forth its objection to ALPA and requesting hearings (R. 85–96), petitioner failed to allege any details, incidents of coercion or any factual data whatsoever supporting its conclusory allegation. The

court of appeals, in affirming the Board's ruling, found these allegations "purely conclusory, and based largely if not wholly on the argument that pilots are part of management" (Pet. App. 6a). It pointed out that "If appellant's charge of coercion has any substance, appellant can apply for the institution of a criminal prosecution. See Railway Labor Act, Section 2, Tenth * * *" (*ibid.*).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 614

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL,

Petitioner,

vs.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF THE RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, IN OPPOSITION.

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OCTOBER TERM, 1961.

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AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL,

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vs.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF THE RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, IN OPPOSITION.

OPINION BELOW, JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The petition adequately covers the Opinion Below, Jurisdiction, and the Constitutional and Statutory Provisions Involved.

QUESTIONS PRESENTED.

1. Whether a District Court has jurisdiction of an action to review a certification by the National Meditation Board for the craft or class of stewardesses under the Rail

way Labor Act, where the union which is duly selected by the stewardesses in a secret ballot election includes within its membership other crew members, some of whom are pilots who during flight exercise command functions over other members of the crew including stewardesses.

2. Whether the refusal of the National Mediation Board to hold a formal hearing on the above question constitutes a violation of due process of law and vests a District Court with jurisdiction to set aside a certificate of the Board.

STATEMENT.

The Air Line Stewards and Stewardesses Association (ALSSA), petitioner herein, was established and organized by respondent Air Line Pilots Association (ALPA) in 1947, and from 1947 to 1960 was its chartered subsidiary affiliate (R. 290, 270-272). As far as the record reveals, the petitioner never considered that its affiliation with ALPA (indeed, its alleged "domination" by ALPA, Pet. 17) constituted an impediment to its representation of the class of stewards and stewardesses under the Railway Labor Act during the years from 1947 to 1960 (R. 290-291). The petitioner's claim that ALPA is not qualified to represent stewards and stewardesses appears to date from August of 1960, when a schism occurred in which certain ALSSA officials removed the union's possessions from its office in the ALPA building as part of an attempt to disaffiliate that organization from ALPA (R. 296-297). ALPA removed the then officers of ALSSA on charges of alleged misconduct and appointed replacements. Legal action was instituted in the Circuit Court of Cook County between the two groups to determine the question as to which are the legally constituted officers of ALSSA (R. 292-295, 245-267). To resolve the resulting representation dispute, ALPA requested the National Mediation

Board to investigate under Section 2, Ninth of the Railway Labor Act (45 U. S. C. § 152, Ninth) and to conduct an election to determine if the stewards or stewardesses of United and Braniff, respectively, preferred to remain a part of the Air Line Pilots Association, as they had been since their initial organization in 1947, or to be represented by the petitioners, who now claimed to be the Air Line Stewards or Stewardesses Association after their efforts to disaffiliate from the parent ALPA (R. 13, 311, 14, 315-316). The action before the Mediation Board was in addition to the extensive civil litigation undertaken in the State Courts of Illinois (R. 245-302, 242-243).

The National Mediation Board invited the petitioner (one of the two factions claiming to be the true ALSSA) to submit a statement with respect to the application of ALPA for an investigation of the United and Braniff representation disputes, and on January 30, 1961, the petitioner submitted lengthy statements in which it sought to persuade the Board that ALPA should not be permitted to appear on an election ballot because of the alleged "supervisory character" (R. 86, 92) of pilots with respect to stewardesses (R. 85-96), and it requested a "formal hearing" (R. 90, 96). The full membership of the National Mediation Board considered the matter on February 7, 1961, and two days later the Executive Secretary of the Board, in advising ALSSA that an election would be conducted among the employees involved in the dispute (R. 97-100), stated:

> "It will be noted there is no restriction contained in the language of the Act on who may be certified as the representative of the employees of a carrier subject to the Act. However, the Board for many years has had a policy of not certifying a carrier or an officer of a carrier as an employee representative for the purposes of the Act. The Board is of the opinion that the Air Line Pilots Association is not barred, under such policy, from making application for investi-

gation of a representation dispute involving the employees in question. The Board must, therefore, decline your request for a formal hearing on this subject" (R. 97-100).

The petitioner on February 20, 1961, filed an action in the United States District Court for the District of Columbia to enjoin "the National Mediation Board from conducting elections, counting ballots, and certifying representatives at Braniff and United with the Air Line Pilots Association on the ballot" (R. 10). United filed an affidavit in opposition to ALSSA's motion for a temporary restraining order and preliminary injunction, in which it urged that, "The only reasonable way to resolve this dispute and to restore to these employees their rights guaranteed by the Railway Labor Act is to proceed with a secret ballot among these employees" (R. 309).

After the District Court declined to enjoin the Board from conducting an election, an overwhelming majority of employees in each case selected ALPA by secret ballot: United's stewardesses favored ALPA by a vote of 891 to 178; Braniff's stewardesses voted 214 for ALPA, 8 for ALSSA (R. 351). The results of the balloting strongly suggest that the petitioner's concern was not over narrow technical questions of law as to ALPA's right to participate, but rather to prevent the employees from exercising their statutory right to select their own bargaining agent.

The District Court on May 5, 1961, found that it was without jurisdiction over the subject matter and allowed the motion for summary judgment of defendant National Mediation Board and the motions to dismiss of defendant Air Line Pilots Association, International, and United Air Lines (R. 352-353). This decision was affirmed by the Court of Appeals in a *per curiam* opinion on July 13, 1961, in which the Court declared that the Railway Labor Act

does not either "expressly or by implication" make a union which also represents pilots ineligible to represent stewardesses even if the pilots perform some supervisory and managerial functions in regard to the stewardesses (Pet. 5a). Concerning the claim of coercion, the Court held that it did not create jurisdiction in the District Court to set aside the Board's determination (Pet. 6a). The Court of Appeals further ruled that no constitutional question was presented (Pet. 5a).

ARGUMENT.

I.

The first basis on which petitioner seeks to have a writ issued is that it was denied due process of law by the failure of the National Mediation Board to grant a hearing as requested. Petitioner argues that this Court never intended *Switchmen's Union* as a ruling that the Mediation Board "might make adjudications of disputed factual issues without holding a hearing" (Pet. 11). Petitioner's statement of the problem indicates several basic misconceptions. Both the language used in the Opinion and the context in which it appears belies any notion that this Court when it decided *Switchmen's Union* was not fully aware that the Mediation board could exercise its powers in Section 2, Ninth, of the Railway Labor Act without a hearing. "While the Mediation Board is given specified powers in the conduct of elections, there is no requirement as to hearings," the Court said. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 304 (1943). Moreover, the petitioner was permitted to present its position to the Board by written statement. Its basic argument was that members of ALPA supervised stewardesses during flight. A hearing, however, was not appropriate because, first, the Act defines "employee" as including not only employees but "subordinate officials", which includes supervisory personnel (Section 1, Fifth, § 201; 45 U. S. C. §§ 151, Fifth, 181) and, second, "there is no restriction contained in the language of the Act on who may be certified as the representative of the employees of a carrier subject to the Act" (R. 97, 99; Pet. 5a). The contention of the petitioner that ALPA be denied a place on the ballot was thus clearly

contrary to the provisions of the Act. The Board's declining to hold a hearing in such a circumstance is no more a denial of due process than is the dismissal of a complaint by a court on the ground it fails to state a cause of action or the allowance of a motion for summary judgment. Cf. *Fay* v. *Douds*, 172 F. 2d 720, 725 (C. A. 2, 1949); *Federal Communications Commission* v. *WJR*, 337 U. S. 265, 274-284 (1948).

This Court recently declined to review a case in which ALPA was certified to represent a craft or class which included pilots, co-pilots, and flight engineers. The command functions of pilots during flight are as applicable with respect to these crew members as to stewards and stewardesses. Obviously if such crew members are properly within the same craft or class and are represented by the same union, there is no basis for questioning the standing of the same union to represent the crew members in the instant case. *UAL Chapter, Flight Engineers' Intern. Ass'n, AFL-CIO* v. *National Mediation Board*, cert. den., 82 S. Ct. 394 (1962); *WAL's Chapter, Flight Engineers' Intern. Ass'n, AFL-CIO* v. *National Mediation Board*, cert. den., 82 S. Ct. 395 (1962). Finally, the fact that Section 2, Ninth of the Act requires a hearing when there is a disposition of a representation dispute by "three neutral persons," while the Act does not require a hearing where the determination is made by the Mediation Board itself, makes it clear that the failure to provide for a hearing before the Board itself was a deliberate choice made by the Congress in recognition of the expertise of the Board in carrying out its functions under the Railway Labor Act.

The arguments of the petitioner, addressed to a Board which is fully conversant with basic relationships in the airline industry, fell of their own accord. Petitioner was seeking to delay the proceedings in the hope its chances for success in the election would improve with the passage

of time. The purpose of the Railway Labor Act would be frustrated if petitioner could have succeeded in such a maneuver. Unwanted as the bargaining agent by the very employees it sought to represent, the petitioner's only hope lay in depriving the employees of an opportunity to express their choice. The choice of who may represent the employees is not for the petitioner or for the Courts. "The majority of any craft or class shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act" (Section 2, Fourth, 45 U. S. C. § 152, Fourth). All that the National Mediation Board did was to give them this choice.

II.

Petitioner's argument that *Switchmen's Union* does not preclude court review of a dispute under Section 2, Ninth, is contrary to the clear language in the opinion in that case. This Court made it clear beyond any doubt that "the dispute was to reach its last terminal point when the administrative finding was made." *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 305 (1943). In such a case, "the administrative remedy is exclusive". *General Committee v. MKT*, 320 U. S. 323, 336 (1943). This Court has recently rejected arguments virtually identical to the petitioner's. *UNA Chapter; Flight Engineers' Intern. Ass'n, AFL-CIO v. National Mediation Board*, cert. den., 82 S. Ct. 394 (1962); *WES Chapter, Flight Engineers' Intern. Ass'n, AFL-CIO v. National Mediation Board*, cert. den., 82 S. Ct. 395 (1962).

The frail reed on which the petitioner would have this Court depart from the salutary rule that there "be no dragging out of the controversy into other tribunals of law" (*Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 305) is a presumed reliance on *Leedom v.*

Kyne, 358 U. S. 184 (1958), where the failure of the National Labor Relations Board to follow an express statutory command was held to vest original jurisdiction in the District Court. But there is no analogy because the petitioner can find no statutory command that was violated by the National Mediation Board. Thus, *Leedom v. Kyne*, is completely inapplicable. The petitioner points to the "direction to the Mediation Board in Section 2, Ninth of the Railway Labor Act, that it 'shall insure the choice of representatives by the employees without interference, influence or coercion'." (Pet. 14). However, closer examination reveals that the quotation is from that part of Section 2, Ninth, authorizing the Mediation Board "to take a secret ballot of the employees involved." It can be readily seen that Petitioner's true complaint against the Board was not that it violated this statutory command or direction, but rather that the Board followed the statutory directive, *i. e.*, it took a secret ballot of the employees involved to ascertain their authorized representative in such manner as to insure their choice of a representative without carrier interference, influence or coercion.

CONCLUSION

For the reasons hereinabove set forth, respondent Air Line Pilots Association, International respectfully prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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No. 614

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, *Petitioner*,

v.

NATIONAL MEDIATION BOARD; FRANCIS A. O'NEILL, JR., individually and as Chairman of the National Mediation Board; ROBERT O. BOYD, individually and as Member of the National Mediation Board; LEVERETT EDWARDS, individually and as Member of the National Mediation Board; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; UNITED AIR LINES, INC.; and BRANIFF INTERNATIONAL AIRWAYS, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CLARIFICATION OF QUESTIONS PRESENTED

The three briefs in opposition to the petition for a writ of certiorari which have been filed in this case, each offers it own distinct version of the questions presented without however arguing that the questions stated in the petition are not presented.

The three restatements of the questions presented, each materially different from the others, all attempt to obscure the presence here of the question of whether the National Mediation Board or the courts below may properly resolve factual disputes without affording any form of hearing of any kind at any time in this case or any other case with respect to the disputed facts. The Board's brief (p. 11) admits that "the Board found as a fact that ALPA is not composed of persons who stand in the relation of the carrier or its officers to stewards and stewardesses." This statement in the Board's brief in opposition is the first time the Board has admitted that it found as a fact that pilots do not represent management to stewardesses. As we pointed out in our petition for a writ of certiorari (p. 5), the Board in denying ALSSA a hearing (J.A. 97-98), did not make it clear and at no other time had made it clear whether it was taking the position factually that pilots do not supervise stewardesses on behalf of management or legally that such supervision on behalf of management was irrelevant under the Railway Labor Act. Each the brief in opposition filed by United Air Lines, Inc. (p. 2) and the brief in opposition filed by the Air Line Pilots Association (p. 2), proceed on the assumption of a legal ruling only and make the question one of whether a "formal hearing" is required before the National Mediation Board can make a legal interpretation of the Railway Labor Act.

As we set forth more fully in our petition for a writ of certiorari (pp. 10-11), there can be no doubt but what the court below avoided the jurisdictional issue by assuming the facts with respect to the managerial and supervisory status of the pilots in relation to stewardesses to be other than the petitioner at all stages of the proceedings alleged and offered to prove (J.A. 3, 5, 7,

86-87, 92-93, 103, 108-109, 337). Accordingly, the petition stated as the first question, the constitutional issue of whether due process of law was denied petitioner when the court below made an adverse factual ruling, dispositive of the case, although petitioner was never afforded a hearing as to the facts before either the Board or any court.

While the Board's restatement of the "Questions Presented" (Bd. Br., p. 2) concedes the presence of a question as to whether "a hearing" is required, the briefs in opposition filed by each United (p. 2) and the Pilots (p. 2), by qualifying the word "hearing" with the word "formal" apparently maintain that some kind of a hearing was held, though not a "formal" one. The court below did not base its decision on any such ground, squarely holding that no hearing is required (p. 5a of Appendix C to the Petition). Indeed, at no time prior to the filing of the briefs in opposition in this Court has it ever been as much as suggested that the Board accorded any kind of a hearing.

The proceedings before the Board in each the Braniff and United Case consisted of: the filing by the Air Line Pilots Association of an application for investigation of a representation dispute; the notification by the Board dated January 25, 1961, to the president of petitioner as the incumbent representative, of the filing of the application together with an invitation "to submit any statement he may care to make with respect to the application" (J.A. 13, 14); the submission by the petitioner on January 30, 1961 of a statement to the Board in the form of a letter (J.A. 85-90, 91-96) setting forth petitioner's position that the Air Line Pilots Association is composed entirely of persons who stand in the relationship of management to stewardesses, listing the factual and legal basis for that

position, including the applicable Civil Air Regulations (14 C.F.R. 40.351(e)) and interpretations (19 C.F.R. 1758) giving pilots complete "command" of the flight attendants with "full authority and control without limitation" (J.A. 86, 92), stating that the petitioner stands ready to introduce evidence in support of its position, and requesting a hearing (J.A. 90, 96); and the letter of the Board reciting its ruling on February 7, 1961 holding that nothing in the statute or Board policy bars the Air Line Pilots Association from representing stewardesses, denying a hearing and directing a mail ballot (J.A. 97-98, 98-99).

This letter of the Board is not consistent with the contention that the Board had given petitioner any hearing or considered any evidence. The letter on its face shows that the Board acted solely on the basis of the petitioner's letter of January 30, 1961. Thus the Board's letter mentions the Board's consideration of only one thing, the letter from petitioner requesting a hearing. The Board's letter starts off "Reference is made to your letter of January 30, 1961 * * * your letter was considered by the full membership of this Board in executive session February 7, 1961" (J.A. 97, 99). So far as we are aware, when the Board made this ruling on February 7, 1961, the Board did not have before it a single iota of proof, not even a claim from anyone, that "ALPA is not composed of persons who stand in the relation of the carrier or its officers to stewards and stewardesses," as we are now told the Board found as a fact (Bd. Br., p. 11).

Braniff has never at any time before the Board or in the courts denied the statements of petitioner (J.A. 3, 7-8, 86-87, 108-109, 118-119, 144, 174) that Braniff's pilots represent managament to the flight attendants, with pilots who are members of the Air Line Pilots

Association holding such positions in Braniff as "Vice-President Operations" and "Director of Flight Operations" (R. 103-104, 108, 118-119, 144), sitting on management committees that bargain as management representatives with representatives of flight attendants and pass on grievances of flight attendants and with all pilots having full power to remove flight attendants from duty, recommend their discharge or otherwise discipline flight attendants (J.A. 3, 7-8). Nor has there been any contention that the National Mediation Board had ever inquired into the relationship of pilots to flight attendants, in the course of its duties or otherwise, at any previous time in its history.

The Board in its brief in opposition here (p. 13) states that it has been the Board's long standing administrative practice to afford parties the opportunity to submit written proofs without holding a hearing and that this practice was approved by this Court in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, at 304. We have been unable to find any support for the assertion that the Board has any such practice or that it was approved by this Court in the cited case. The Board offers no support in its brief for this statement. The Board's publication of its rules and practices in the Code Federal Register contains no reference to such a practice (see Rules printed as Appendix A to this brief, pp. 20-21, *infra*). The *Switchmen's* case involved a traditional type hearing with the presentation of witnesses and other evidence at a public hearing before the Board itself (Record before this Court in No. 48, October Term, 1943, pp. 28-29, 76, 83; *New York Central R.R. Co.*, 1 N.M.B., 197, 198) and there was no issue raised before this Court as to the adequacy of that hearing. The Board has only made available to the public one volume of printed decisions,

that entitled "Determination of Craft or Class of the National Mediation Board, Vol. 1, January 31, 1935—June 30, 1948 (Gov't Print. Off. 1948). This volume contains repeated recitals of the holding of a public hearing to receive evidence before the entire Board itself (see e.g., p. 211) or before one Board member (see e.g. pp. 2, 10, 12, 16, 25, 28, 35, 40, 52, 59, 62, 68, 90, 111, 115, 130, 138; see specific reference to presentation of evidence through witnesses at pp. 90, 111, 115, 149, 167, 270, 277, 285, 388, 407, 480). We find no mention of the submission of proofs in written form, except in instances where the parties at the hearing stipulated to present certain matters by written statements.

And in the instant case there was never any indication given to the petitioner that it would be afforded any opportunity or expected to submit proof in written form. The only provision with respect to the method of offering proof to the Board which appears in the Board's Rules and Regulations by its terms applies to requests for hearings on the class or craft issue. This provision directs the party seeking a hearing to file a letter with the Board stating the request. The only Board Rules and Regulations with respect to submitting proof to the Board are the following (29 C.F.A. 1202.5, 1202.8):

> "§ 1202.5 *Rules to govern elections.* In the conduct of a representation election, the Board shall designate who may participate in the election, which may include a public hearing on craft or class, and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within 10 days designate the employees who may participate in the election.
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> * * * *

"§ 1202.8 *Hearings on craft or class.* In the event the contesting parties or organizations are unable to agree on the employees eligible to participate in the selection of representatives, and either party makes application by letter for a formal hearing before the Board to determine the dispute, the Board may in its discretion hold a public hearing, at which all parties interested may present their contentions and argument, and at which the carrier concerned is usually invited to present factual information. At the conclusion of such hearings the Board customarily invites all interested parties to submit briefs supporting their views, and after considering the evidence and briefs, the Board makes a determination or finding, specifying the craft or class of employees eligible to participate in the designation of representatives."

Admittedly these rules are not expressly applicable because in this case a hearing was requested in United entirely, and in Braniff in large measure, for issues other than craft or class. But these rules provided the only guide the Board has issued. Petitioner cannot constitutionally be deprived of a hearing on the theory it failed to follow a procedure entirely unknown to it.

The Board in its brief in opposition (p. 2), in its restatement of the question presented, injects the notion that the Board's failure to hold a hearing was justified because the Air Line Pilots Association would only be certified if it were "chosen" by a majority in the election. The Pilots in their brief in opposition (p. 2) similarly inject the fact that a majority of the flight attendants selected the Pilots in an election as properly an element of the issue whether a union of management representatives may properly be certified.

In understanding why this element of supposed choice is not properly an element in the questions pre-

sented, it should first be noted that the restatement of the questions by both the Pilots and United attempts to obscure the admitted fact that the Pilots' organization is composed entirely of persons having command authority over flight attendants both by law (J.A. 7, 86, 92, 14 C.F.R. 40.351(e); 19 C.F.R. 1758), by company regulations (J.A. 103, 346-347), and by agreement between the air lines and the Pilots (J.A. 103-104, 118-119) and that no flight attendant is eligible to membership in, and no flight attendant is now or ever has been a member of, the Air Line Pilots Association (J.A. 3, 85-86, 91-92, 176). The question is not whether, as United puts it (Br., p. 2), "a labor organization which represents air line pilots," or as Pilots put it (Br., p. 2) a union which "includes within its membership other crew members," can properly represent flight attendants. The question rather, as stated in the petition for a writ of certiorari (pp. 2-3), pertains to the representative capacity of "a union of pilots who have command authority over stewardesses and are management representatives and supervisors in their relationships with stewardesses."[1]

Turning now to the attempt to inject into the questions presented the element of choice of the flight

[1] With respect to the engineers whose presence in the Pilots organization has been repeatedly mentioned in the briefs in opposition (Bd. Br., p. 10, 22; United Br., p. 9; Pilots Br., p. 7), the record in the Engineers case showed that engineers regularly served as second officers and that except for 10 out of 668 flight engineers employed by United all flight engineers either possessed or were acquiring commercial pilots certificates, page 223 of the record in No. 531, October Term, 1961, *UNA Chapter, Flight Engineers' Inter. Ass'n* v. *National Mediation Board*, certiorari denied, 82 S. Ct. 394. The Braniff contract with the Pilots provides that the second officer shall be "third in command of the aircraft and has authority over other crew members" and shall hold a current commercial airman's certificate (J.A. 119).

attendants, this element is here immaterial if we are correct in our contention that as a matter of law and of fact the pilots are management representatives in their relationship with flight attendants. No collective bargaining is possible where management representatives sit on both sides of the table (see cases cited in footnotes 4 and 5, page 17 of our Petition in this case). Nor can the employees' vote be regarded as reflecting their free choice where the element of managerial coercion is present. In addition, the election conducted here was not secret. Petitioner requested a secret election conducted by the use of ballot boxes alleging that the sending of mail ballots to stewardesses afforded pilots full opportunity to take the ballots from the girls and mark and mail them (J.A. 9). The balloting on both Braniff and United was nevertheless conducted by mail ballots (J.A. 316-317, 332-333). The ballots on Braniff were mailed on February 16 returnable March 6 (J.A. 332-333). There was not even a direction to the person casting the ballot to "sign" any envelope or other form of identifying the voter but merely "to place your name and address" on the mailing envelope (J.A. 320, 333) and no signature list was provided which would make it possible to verify the voter's signature, but only a "list of eligible voters" (J.A. 330).

CLARIFICATION OF STATEMENT

The restatement of the case in the Board's brief in opposition is fair and accurate as far as it goes, subject to the following qualifications:

The description of the election as conducted by "secret ballot" (Bd. Br., p. 6) is inaccurate in view of the mailing of ballots to stewardesses, with a return date more than two weeks off, and without even so

much as a provision for a signature of the voter or any other provision aimed at assuring that the ballot was marked and returned by the hostess to whom it was mailed (J.A. 317, 320, 330-333). The Board's quotation of the election results (Bd. Br., p. 7) is hence meaningless.

Likewise the Board's characterization of authorization cars as "valid" and reference to the number signed by hostesses authorizing the Pilots to represent them, again begs the question at issue. The extent of hostess signing of cards in favor of representation by a pilot association in which the hostesses have neither membership nor any form of representation, rather indicates the extent to which pilots used their command authority over hostesses to assure that pilots would dictate the full employment relationship of hostesses without hostesses having any independent representation.[2]

The Board's description of the denial of a hearing as "a refusal to afford petitioner union a hearing in

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[2] The votes cast in the elections set forth in footnote 2, page 4 of our petition for writ of certiorari, reinforce our view that the election results in the instant case must be taken as evidencing manag ment coecion rather than free choice:

Name of Airline	National Mediation Board Case No.	Date of Election	Votes for Air Line Stewards and Stewardesses Association	Votes for Air Line Pilots Association	Number of Eligible Voters
Trans World Airlines	R-3511	12- 4-61	789	459	1,533
Eastern Air Lines	R-3507	10-12-61	788	62	1,349
Northwest Airlines	R-3454	7- 7-61	301	15	401
Northeast Airlines	R-3518	12-11-61	151	8	238
Western Air Lines	R-3498	8- 8-61	118	71	246
Pacific Air Lines	R-3508	11-17-61	23	1	46
Caribbean Atlantic	R-3499	7- 7-61	9	6	17

advance of its action" (Bd., Br., p. 7) suggests the incorrect inference that petitioner was afforded a hearing at some later date. At no time was petitioner afforded any hearing by the Board or the courts below on the disputed factual issues.

The briefs in opposition filed by the Pilots (Br., pp. 2-3) and by United (Br., pp. 2-3) seek to inject into this suit the facts respecting an abortive attempt by the Air Line Pilots Association to displace the duly elected officers of the Air Line Stewards and Stewardesses Association and replace them with the officers of the Air Line Pilots Association, on some theory that the Air Line Stewards and Stewardesses Association had in the past been a subsidiary or affiliate of the Pilots. The record before the National Mediation Board in this case on February 7, 1961, when the Board made the order here attacked, contained no mention of any factional strife within the Air Line Stewards and Stewardesses Association, nor any claim that the Air Line Pilots Association was seeking certification on some theory that it constituted some faction of a stewardesses organization.

This case was never presented to the National Mediation Board as a dispute between two factions of stewardesses. The case was presented to the National Mediation Board and was always treated by the National Mediation Board as an application of a pilots association to represent stewardesses who were already represented by the stewardesses union. The Air Line Pilots Association filed applications to represent stewardesses employed by Braniff and United which were at the time represented by the Air Line Stewards and Stewardesses Association (J.A. 4-5, 13, 14, 15; 17-45, 46-84). The applications made no mention of any

alleged schism within the Air Line Stewards and Stewardesses Association nor any claim that the Air Line Pilots Association claimed the Air Line Stewards and Stewardesses Association as its subordinate affiliate. The National Mediation Board notified Rowland K. Quinn, Jr., the duly elected president of the petitioner, of the filing of the applications and continued to deal with Quinn as the president of the incumbent union (J.A. 4-7, 13, 14, 97, 99).[3]

It was only after the petitioners filed the instant suit in the court below that the Pilots attempted to raise their view that somehow because some pilots had coerced some hostesses to take the view that pilots should represent hostesses, the pilots' claim of representation constituted a factional dispute within the Air Line Stewards and Stewardesses Association (J.A. 242-304). Since the district court dismissed the case for want of jurisdiction of the federal courts to review action by the National Mediation Board (J.A. 352-353), there was no occasion for the pleadings with respect to the alleged factional dispute to be completed. This whole alleged factional dispute is irrelevant in this case. If the Court is interested, however, the

[3] Not only in the representation cases here involved, namely the Braniff and United cases, but in all of the subsequent representation cases listed in footnote 2, *supra*, p. 10, the National Mediation Board has ruled that Rowland K. Quinn, Jr., and the other duly elected officers of the Air Line Stewards and Stewardesses Association would be recognized by the National Mediation Board as the legal officers of the Air Line Stewards and Stewardesses Association, and the dispute between the Air Line Pilots Association and the Air Line Stewards and Stewardesses Association would be treated as a dispute between two independent unions and not as a factional dispute between stewardesses. See decision dated July 20, 1961 in *Western Air Lines*, N. M. B. Case No. R-3498.

Pilots never received any of the relief for which they prayed (J.A. 265-266) in the complaint (J.A. 245-267) in the suit in the Circuit Court of Cook County to which the Pilots (pp. 2-3) and United (p. 2) in their briefs in opposition make reference and that complaint was dismissed by the Circuit Court of Cook County on June 12, 1961 for failure of the Pilots to comply with court orders requiring production of a list of the "executive active" members of the Air Line Pilots Association, that is members who occupied executive positions with air lines, and of the constitution and by-laws of the Air Line Pilots Association as amended November 24, 1960.

Hence there is no basis in the record for the portrayal to this Court by both United (Br., p. 3) and Pilots (Br., p. 3) of the petitioner as appearing before the National Mediation Board as "one of the two factions claiming to be" the true Air Line Stewards and Stewardesses Association. No one ever claimed before the National Mediation Board at any time prior to its order of February 7, 1961, that the Air Line Stewards and Stewardesses Association was not the whole organization which had previously over the years been certified and represented the hostesses on Braniff and United.

This very mimicking by United in its brief in opposition (p. 3) of the Pilot's claim that the petitioner is but one faction of the Air Line Stewards and Stewardesses Association, is a continuation by United of the role of support to the Pilots in their efforts to represent hostesses, which formed one of the bases for the allegations in the complaint here that United had interfered with, influenced and coerced hostesses to leave their own union and consent to representation by

the pilots (J.A. 9-40). As is set forth in the affidavits filed in the district court in support of a motion for preliminary injunction, when the Pilots in August 1960, attempted to take over the Stewardesses union, United at once ceased dealing with the Stewardesses union and began dealing with the Pilots as the representatives of the hostesses (J.A. 340-341). The assertion of United (Br., p. 4) that United's denial that its officials engaged in "any organizing activity among the stewardesses * * * has not been challenged," avoids the issue in that the challenging affidavit (J.A. 340-342) showed that the role of United's top management, although perhaps not "organizational" nevertheless constituted prohibited influence, interference and coercion.

Indeed, the extreme lengths to which top management of United has gone to support the cause of the Pilots is evident by the efforts of United to establish that its pilots have no supervision over stewards and stewardesses. Three days after the National Mediation Board ruled that the Air Line Pilots Association was not disqualified to represent stewards and stewardesses, R. F. Ahrens, Senior Vice President-Personnel of United, wrote the Board that "Pilots of United Air Lines do not act in a supervisory relationship to stewards or stewardesses" (J.A. 325-326). When this letter was attached to the Board's motion to dismiss in the district court (J.A. 321-326), petitioner filed pages from the United Pilots Manual and the United Stewardesses Manual bearing the instruction to pilots that they are "responsible" for "supervision of crew members" (J.A. 344, 346) and the instruction to stewardesses that "All Stewardesses and Flight Stewards are responsible to the Captain" (J.A.

344, 347). In reply, Charles M. Mason, Vice-President-Employee Relations of United (J.A. 305), explained these provisions in its manuals as merely issued to implement the Civil Air Regulations providing that the pilot must be in command of the crew, with full control and authority without limitation over all crew members and their duties (J.A. 308-309). Admittedly crew members as here used includes stewards and stewardesses (J.A. 308-309), and stewards and stewardesses spend more than 90 per cent of their working time on board planes under the direct command and control of pilots (J.A. 343).

United in its brief in opposition (p. 5) makes the point that the allegations of the complaint with respect to the managerial and supervisory status of the pilots were not verified, ignoring that affidavits filed in support of the motion for temporary restraining order and preliminary injunction fully support these allegations (J.A. 108-109, 237-238, 343-348).

REPLY TO RESPONDENTS' ARGUMENTS

The chief argument against review which has been advanced by the respondents (Bd. Br., pp. 9-13; United Br., pp. 8-9; Pilots Br., pp. 7-8), is that an allegedly "similar issue" was denied review by this Court on January 8, 1962, in *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board*, No. 531, and *WES Chapter, Flight Engineers' International Association* v. *National Mediation Board*, No. 540. These cases however, involved no issue as to the constitutional validity of a finding of a disputed fact without a hearing. The decisions by this Court upholding instances of administrative action as final have always clearly excepted from non-review-

ability all instances where the claim of illegality rests on constitutional grounds. See for example, *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301, "all constitutional questions aside;" *Inland Empire District Council* v. *Millis*, 325 U.S. 697, 710, "no substantial question of due process is presented."

The brief in opposition filed by United relies heavily on the contention that the Board decided "no factual question" to argue that no constitutional issue exists here (United Br., p. 8). But the Board in its brief in opposition (p. 11) says it did base its ruling on its finding "as a fact that ALPA is not composed of persons who stand in the relation of the carrier or its officers to stewards and stewardesses."

The failure to accord a hearing before finding as to disputed facts cannot be excused by claims that the Board "is fully conversant with basic relationships in the airline industry" (Pilots Br., p. 7) or may take judicial notice of the pilots' alleged militancy on their own behalf (United Br., p. 9) or by the Board's alleged expertise (Bd. Br., p. 12). This Court has uniformly held that the constitutional requirement of due process of law could only be met by disclosure by the administrative agency of the evidence upon which it relied, with opportunity afforded to offer countervailing evidence. *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 300, 302, 304; *First Morgan Case* (*Morgan* v. *U. S.*), 298 U.S. 468, 480; *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio*, 294 U.S. 63, 68-69, 71; *Bratton* v. *Chandler*, 260 U.S. 110, 114-115. The mere opportunity to file a written state-

ment does not suffice. *Londoner v. City and County of Denver*, 210 U.S. 373, 386.

Nor are we aware of any material which would afford any basis for the Board's taking judicial notice of the alleged non-managerial status of pilots. The only study we have been able to find of the relationship of the pilots to management is a doctoral thesis by Dr. John M. Baitsell of the Graduate School of Business Administration of Harvard University on Airline Industrial Relations, in Chapters 7 and 8 of which Dr. Baitsell concludes that airlines are dominated to an unique degree by their pilot groups.[1] The petitioner here has alleged and stands ready to prove that the Air Line Pilots Association is "composed of pilots many of whom occupy important management positions on commercial air carriers including but not limited to airline management positions such as president, vice president, high level positions in airline operations departments, chief pilots, assistant chief pilots, flight instructors and members of management committees which bargain with the Air Line Stewards and Stewardesses Association" (J.A. 3).

The fact that pilots are allowed to bargain on their own behalf and to be included in the same unit with copilots and flight engineers whom they supervise (Bd. Br., pp. 12-13; United Br., pp. 8-10; Pilots' Br., p. 7) in no wise establishes that pilots do not stand in the relationship of management to stewards and stewardesses. Pilots, copilots and flight engineers are all li-

[1] The thesis is scheduled for publication by the Wertheim Foundation, and in the meantime may be borrowed from the Baker Library at the Harvard School of Business Administration.

censed officers who each have command over the unlicensed crew members who serve under them (J.A. 103-104, 118-119).[7] No flight attendant is licensed. As a group pilots, copilots and flight engineers resemble the masters, mates and pilots on sea-going vessels, who for years have been organized into the International Organization of Masters, Mates and Pilots and bargain on their own behalf but who are at the same time concededly management as to the unlicensed personnel serving under them and ineligible to serve as bargaining representatives of the unlicensed personnel. *Virginia Ferry Corp.* v. *N.L.R.B.*, 4th Cir., 1939, 101 F. 2d 103, 105-106; *N.L.R.B.* v *Delaware New Jersey Ferry Corp.*, 3rd Cir., 1942, 128 F. 2d 130, 137.

The wide disparity between pilots and stewardesses is apparent from the fact that a pilot on a jet airplane has an annual salary of from $30,000 to $33,000 a year, whereas the average annual wage of the stewardesses on United and Braniff is less than $4,000 a year (J.A. 18, 50, 87, 93, 104, 240, 241). Pilots have a stable career whereas the turnover rate among stewardesses is between 40 and 60 per cent per year (J.A. 87).[8]

The argument that the public will be injured by the delay necessarily attendant upon judicial review of Board action (United Br., p. 11), merits no considera-

[7] U. S. Dept. of Labor, Bureau of Labor Statistics, Bulletin No. 1235-62, Employment Outlook for Pilots, Stewardesses and Other Air Transport Occupations, 1959, p. 473; Arthur M. Wiseheart, The Airlines-Recent Experience under the Railway Labor Act, 25 Law and Contem. Prob. 22, 24 (Winter, 1960).

[8] U. S. Dept. of Labor, Bureau of Labor Statistics, Bulletin No. 1235-62, *op. cit.*, pp. 472-473, 476.

tion when as here speed is based on a denial of due process.

Respectfully submitted,

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February 23, 1961.

APPENDIX A

Administrative Regulations Involved

The relevant provisions of the Rules and Regulations of the National Mediation Board, as amended April 13, 1954 (29 C.F.R. 1201.1, *et seq.*) are as follows:

"§ 1202.3 *Representation disputes.* If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Railway Labor Act, it is the duty of the Board, upon request of either party to the dispute, to investigate such dispute and certify to both parties, in writing, the name or names of individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and to certify the same to the carrier.

"§ 1202.4 *Secret ballot.* In conducting such investigation, the Board is authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier.

"§ 1202.5 *Rules to govern elections.* In the conduct of a representation election, the Board shall designate who may participate in the election, which may include a public hearing on craft or class, and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within 10 days designate the employees who may participate in the election.

"§ 1202.6 *Access to carrier records.* Under the Railway Labor Act the Board has access to and has power to make copies of the books and records of the

carriers to obtain and utilize such information as may be necessary to fulfill its duties with respect to representative of carrier employees.

"§ 1202.7 *Who may participate in elections.* As mentioned in § 1202.3, when disputes arise between parties to a representation dispute, the National Mediation Board is authorized by the act to determine who may participate in the selection of employees representatives.

"§ 1202.8 *Hearings on craft or class.* In the event the contesting parties or organizations are unable to agree on the employees eligible to participate in the selection of representatives, and either party makes application by letter for a formal hearing before the Board to determine the dispute, the Board may in its discretion hold a public hearing, at which all parties interested may present their contentions and argument, and at which the carrier concerned is usually invited to present factual information. At the conclusion of such hearings the Board customarily invites all interested parties to submit briefs supporting their views, and after considering the evidence and briefs, the Board makes a determination or finding, specifying the craft or class of employees eligible to participate in the designation of representatives."